VOLUME 2

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1965

No. 131

MARGARET L. HOLT, ET AL., PETITIONERS,

vs.

ALLEGHANY CORPORATION, ET AL.

No. 132

MARGARET L. HOLT, ET AL., PETITIONERS,

vs.

ALLAN P. KIRBY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONS FOR CERTIORARI FILED MAY 12, 1965
CERTIORARI GRANTED JUNE 1, 1965

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[fol. 811] New York, April 15, 1963,
10:30 A.M.

* * * * * * *

[fol. 812] EDWARD BAUGEARD, called as a witness by the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Updike:

Q. Mr. Baugeard, by whom are you employed?

A. Mr. Allan Kirby.

Q. Was that employment also in existence in 1949 and 1950?

A. Yes, sir. I would like to say that in 1949 and 1950 I was paid by Alleghany Corporation.

Q. Did you make your office out in Morristown?

A. I did, sir.

Q. How long had you made your office in Morristown?

A. Since 1942.

Q. What functions did you perform in Morristown?

A. I was a statistics and security analyst.

Q. Did you have an office in the Alleghany office in New York?

[fol. 813] A. No, I did not.

Q. So that so far as your time was concerned it was spent completely out in Morristown from 1942 forward?

A. That's correct.

Q. In 1949 were you engaged in performing this analytical and statistical service work for Mr. Kirby?

A. Yes, sir.

Q. At that time Mr. Kirby was a director of several corporations, was he not?

A. Yes, sir.

Q. Did you perform work for him in connection with his directorships in those corporations as well?

A. I am sorry, that question is not clear to me. I don't know exactly what you mean.

Q. Did you perform any statistical and analytical work

in connection with his service as a director of that corporation?

A. Yes.

Q. In the course of your duties as analyst and statistician did you do some work with respect to the acquisition by Alleghany of IDS in 1949?

A. I discussed the acquisition with Mr. Shipman and I prepared at least one memorandum subsequent to that con-
[fol. 814] ference that I had with Mr. Shipman for Mr. Kirby's use.

Q. Is that your recollection indicates up to the present moment with respect to what you did on that matter?

A. I have no distinct recollection of any specific work, although I am sure that there were other items when we may have examined earnings or looked at other material relating to it.

* * * * * * *

[fol. 815] Q. I show you Plaintiff's Exhibit 302 for identification and ask you if that is a memorandum from you to Mr. Kirby made February 11, 1949.

A. It has my name on it and it looks like—

The Court: It looks like your memorandum?

The Witness: Yes.

Q. Do you recall, sir, that you did have a meeting with Mr. McKinney and Mr. Shipman?

A. I did.

Q. In that connection?

A. Yes.

Mr. Updike: I offer it in evidence.

Mr. Whittlesey: I don't quite see the relevance.

Mr. Updike: The relevance of this is to show the state of Mr. Kirby's knowledge.

The Court: This is a two-line memorandum, "Tomorrow at 10 a.m. I meet Mr. McKinney and Mr. Shipman to discuss the Investors Syndicate matter."

[fol. 816] It is signed apparently by Mr. Baugeard. The relevance might be what he discussed, but you don't have

to put every scrap of paper leading to a conference in. I won't take it. Let us get to the substance of it, not to the fact that he met, but what was discussed and what he told Mr. Kirby.

By Mr. Updike:

Q. Do you have a recollection of meeting with Mr. Shipman, Mr. Baugeard?

A. Yes, sir.

[fol. 817] Q. Prior to making this memorandum of February 11, 1949, had Mr. Kirby asked you to meet with those two gentlemen?

A. I don't remember.

Q. Well, did you have any standing instructions from Mr. Kirby with respect to meeting with people in the course of your work as an analyst and statistician?

A. No standing instructions, no, sir.

Q. Well, what were your instructions?

Mr. Kissam: I object to this.

The Court: Overruled. He may answer.

A. I had no specific instructions. When something would come up that would necessitate my going to New York to meet somebody, to discuss something, I would let him know about it. I had no standing instructions.

Q. Did he give you the discretionary authority to talk with these people in order to inform yourself and then report to him?

A. Well, if I was going to prepare a memorandum for him on some particular matter, it might be necessary for me to go into New York to see people, to discuss something. I had to go in, for instance, to the Remington Rand people to talk to them when they were first coming out with the [fol. 818] computer business. This is normal in this business. You talk to the people who are as close to the situation as you can.

Q. Mr. Kirby, at this time was the president of Alleghany, was he not?

A. Yes, sir.

Q. And you were requested by him, in some connection, to advise him with respect to the IDS problem, were you not?

A. Well, he probably wanted me to go over the figures or some data or statistical material.

Q. Certainly it was Mr. Kirby who made the decisions once the information was obtained, isn't that right?

A. That's right.

Q. Now I show you, sir, Plaintiff's Exhibit 303 for identification and ask you if that is a memorandum from you to Mr. Kirby made at or about the 14th of February, 1949?

Mr. Updike: I will correct the record. I understand this document is in evidence.

The Court: Well, if it is in evidence then why do you want to ask him about it?

A. Yes, I remember this memorandum.

Q. Mr. Baugeard, prior to the time that you wrote that [fol. 819] memorandum had you done a certain amount of analysis and statistical work on this problem for Mr. Kirby?

A. Not that I recall at all.

Q. Was this virtually your first acquaintance with it?

A. I believe so.

Q. Now, when you talked with Mr. McKinney and Mr. Shipman did you report to Mr. Kirby the gist of the information that was given to you at that time?

A. My report apparently is in this memorandum.

Q. Yes. Did you supplement your reports from time to time with oral explanations?

A. Not that I remember.

Q. Well, sometimes did Mr. Kirby raise questions about material that you had put in a report to him?

A. He might have.

Q. And didn't you give oral explanations from time to time with regard to those?

A. Yes.

Q. Now I direct your attention, sir, to the portion of your memorandum, which is apparently a tabulation with

respect to the period 1949 through 1956. Do you see that, sir?

[fol. 820] A. Yes.

Q. That purported to set forth the projections that had been filed with the SEC by IDS; am I right about that?

A. That is what the memorandum says here.

* * * * * * *

[fol. 821] Q. Do you remember that some time back in December of 1948 Mr. Kirby had had a meeting with Mr. Shipman with respect to this subject matter?

A. I wouldn't know whether Mr. Kirby had a—I wouldn't necessarily know when Mr. Kirby had a meeting with Mr. Shipman.

Q. Well, Mr. Shipman was another analyst, was he not, sir?

A. Yes.

Q. And I show you what has been marked in the case here as Plaintiff's Exhibit 300 in evidence, which is a copy of a letter produced from Mr. Kirby's files, addressed to Mr. Purcell, and ask you if reading that letter refreshes your recollection with respect to that meeting?

A. This isn't a very clear copy. There are parts of it I can't read. But I think I remember the meeting.

[fol. 822] Q. You think you do?

A. Yes, sir.

Q. Now, can you recall that starting at about that time Mr. Kirby asked you to examine into the affairs of Investors Syndicate as a possible acquisition by Alleghany by working with Mr. Shipman or with anyone else?

A. I don't remember discussing it with Mr. Kirby at that time.

Q. Do you remember knowing Mr. Shipman at the time that that letter was written?

A. Oh, yes, yes.

Q. I now show you Plaintiff's Exhibit 304 for identification, which purports to be a copy of an original letter from Mr. Shipman to you.

The Court: What is your question? You have no question.

Q. Do you recollect receiving that exhibit, sir?

A. I don't remember it, but it obviously is—I received it.

The Court: What is your next question, Mr. Updike?

Q. Now, as a matter of fact, Mr. Baugeard, didn't you, a few days later, prepare a summary of that report that [fol. 823] is enclosed with Plaintiff's Exhibit 304 for identification for Mr. Kirby?

Mr. Updike: Showing the witness Plaintiff's Exhibit 308 for identification.

Mr. Kissam: Has that got a Zenn number on it, Mr. Updike?

Mr. Updike: No.

Mr. Phillips: Do you have a copy of that exhibit, Mr. Updike?

Mr. Updike: Yes.

A. I don't remember this particular one, but I wrote it obviously.

Q. Now, was it your practice, sir, to put carbons of your memoranda in your file at or about the date that they bore in 1949?

A. I didn't always—I can't say that I always made a carbon.

Q. That is not my question. Where a carbon was made did you file it in your file at or about the date that it bore?

A. That would be normal procedure, yes, sir.

Q. Can you recognize that as a carbon of a memorandum from you to Mr. Kirby, or copy of it?

The Court: He says he admits he wrote it. He has no [fol. 824] present recollection. He admits he wrote it, so what are we arguing about?

Mr. Updike: I am seeking to establish that it went in the file at or about the date that it bore, that is all.

The Court: Ask him where it came from.

Is that something that came out of your file?

The Witness: I don't know whether it came out of my file or Mr. Kirby's files, your Honor, but I wrote it.

[fol. 825] By Mr. Updike:

Q. Mr. Baugeard, I show you Plaintiff's Exhibit 331 for identification, which purports to be a memorandum from you to Mr. Kirby dated August 5, 1949, and produced by his counsel here as coming from Mr. Kirby's files, and I ask you if you wrote that memorandum to him?

* * * * * * *

A. I don't remember writing the memorandum, but it apparently is mine.

Q. Do you recognize the handwriting on that memorandum?

A. Yes.

Q. As being yours?

A. Yes.

Q. The handwriting referred to—

The Court: What do you want to do with it?

Mr. Updike: I offer it in evidence.

Mr. Phillips: May I have a copy, Mr. Updike? I have seen none of the exhibits that you are offering.

The Court: Are you just offering the top page of this or all of it?

[fol. 826] Mr. Updike: They came as one group from Mr. Kirby's files.

(Pause.)

The Court: You want to offer this. He says he undoubtedly wrote that memorandum. Did that memorandum have attached to it these papers?

The Witness: I haven't looked at those, sir.

A. I don't have any recollection of the pages that are attached to it at all.

* * * * * * *

[fol. 827] The Court: You got no objection to this being put in evidence, have you, Mr. Whittlesey?

Mr. Whittlesey: I would have this objection, your Honor.

Specifically take the letter dated August 4, 1949, it is a copy of a letter addressed by Mr. Crabb of IDS to Mr. Shipman at Alleghany. One copy turns up in Mr. Kirby's files, no question about that. But on this specific charge we have here of failure of Mr. Kirby to adduce the facts in his possession, we are talking about a letter, the original of which is in the files of Alleghany. The testimony before your Honor by Mr. Graubard was that in the hearings before the referee extensive and voluminous files of Alleghany were produced, something like 16 man hours of lawyers' time of the objectants were spent on those files, and Mr. Graubard said that he was satisfied that Alleghany had fully complied with the subpoena to the extent of everything in its files.

[fol. 828] The Court: You say this letter was in the files of Alleghany?

Mr. Whittlesey: Exactly.

The Court: A copy was in the possession of Mr. Kirby, apparently. From that standpoint, I will receive it in evidence.

(Plaintiff's Exhibit 331 received in evidence.)

* * * * * * * *

[fol. 829] Q. Mr. Baugeard, do you recall that Froggatt & Company were employed as the actuarial people to review the actuarial aspect of IDS?

A. No, I do not recall that.

Q. The name has a familiarity to you, does it?

A. It has now, but at that time I did not know anything [fol. 830] about him, I never heard of him.

Q. Let me show you, Mr. Baugeard, Plaintiff's Exhibit 220 for identification and ask you if that is not the actuarial report referred to in the memorandum which his Honor just ruled was in evidence as Plaintiff's Exhibit 331?

A. I suppose it is, Mr. Updike, I don't know.

* * * * * * * *

Q. Mr. Baugeard, in the summer of 1949, was Mr. Kirby receiving some reports from time to time with respect to the affairs of IDS?

A. I don't know, Mr. Updike.

Q. Do you have any memory on it one way or the other?

A. I do not.

Q. You don't have any memory that he was or was not?

[fol. 831] A. I do not.

Q. I show you Plaintiff's Exhibit 336 in evidence and Plaintiff's Exhibit 335 in evidence and Plaintiff's Exhibit 257 in evidence, and ask you just to refresh your memory from looking at them.

A. These two are from Mr. Shipman out to Mr. Waag, I would never have seen those.

Q. Mr. Baugeard, would you look at the one marked Exhibit 336, which is from Mr. Shipman addressed to Mr. Waag, the middle paragraph of it (handing)?

A. Yes, I see.

Mr. Whittlesey: That is from Mr. Purcell's secretary to Mr. Baugeard.

(Pause.)

The Court: What is your question?

* * * * * * *

Q. Drawing your attention to the middle paragraph, Mr. Baugeard, it says:

"Will you please see that this sort of information is sent regularly to Mr. Young, Mr. Kirby and myself."

[fol. 832] Do you recall Mr. Kirby's asking to receive additional reports from IDS?

* * * * * * *

A. I don't recall; I don't remember.

* * * * * * *

[fol. 833] Q. Do you recall seeing at any time in this period ending December 31, 1949, any projections with re-

[fol. 834] spect to the affairs of IDS and the matching of current performance against projections?

A. No, I do not.

• • • • • • •

[fol. 835] Mr. Updike: I would like to make one more try, sir, with respect to Plaintiff's Exhibit 220. I will show the witness a portion of the exhibit to see if it will refresh his recollection.

By Mr. Updike:

Q. This, sir, is the so-called Froggatt report that I asked you about earlier, and I draw your attention to Schedule C of that exhibit, which is a tabulation of projected future earnings of IDS, and ask you if the sight of that, remembering that you were an analyst and statistician at the time, refreshes your memory that you did see that report or one like it?

Mr. Whittlesey: That report.

A. I don't remember it, Mr. Updike.

Q. All right. I now show you, sir, Exhibit 244 for identification, which purports to be a projection of future income by months for IDS and ask you if you ever saw that before?

A. I don't remember ever seeing anything like this.

Q. I show you Plaintiff's Exhibit 339 for identification and ask you first if you recall that there was a concern at IDS, having some relationship to IDS, known as ISA or Investors Syndicate of America; do you remember that?

[fol. 836] A. I remember the name, yes, sir.

Q. You remember the name. Do you remember what its relationship was to IDS?

A. It was a wholly owned subsidiary.

Q. Yes. Now I show you 339 for identification, which was produced by Mr. Kirby's counsel from his files, and ask you if you recognize having received that at or about the date it bears, which I believe is December 1949.

Mr. Whittlesey: I think this bears no date at all.

Mr. Updike: Well, the broad schedule, Mr. Whittlesey, covers the period ending December 31, 1949.

Mr. Whittlesey: But I think you will concede that the paper itself bears no date.

A. What was the question, Mr. Updike?

Q. Now, do you recognize having received that with respect to the affairs of ISA?

A. I don't remember it, no, sir.

Q. You don't recall it?

A. No, sir.

• • • • • • •

[fol. 837] Q. Now I show you Plaintiff's Exhibit 243 for identification, which purports to be a five-year projection of IDS net income and ask you if you ever saw that before?

A. I don't recall seeing this document.

Mr. Whittlesey: I did not hear that answer.

Mr. Updike: He said he did not recall.

Q. Mr. Baugeard, you tell his Honor that in 1949 and early 1950 you had no knowledge that IDS in the regular course of its business projected its future earnings?

• • • • • • •

[fol. 838] A. I have no knowledge that Investors Syndicate prepared such projections. I did not—it surprises me now.

• • • • • • •

[fol. 839] Cross examination.

By Mr. Whittlesey:

Q. Mr. Baugeard, were you at any time an assistant secretary of Alleghany Corporation?

A. Yes, sir.

Q. And do you know at what period or over what period you were an assistant secretary?

A. Up until I believe it was 1961, and prior to that time I would say perhaps 1955 or thereabouts. I don't recall the years exactly, Mr. Whittlesey.

Q. Now, I call your attention to Exhibit 331 in evidence, and specifically the memorandum dated August 5, '49, which you state it was your memorandum, which reads:

"Mr. Shipman telephoned this morning to say that he had received the latest actuarial report on Investors Diversified Services and is sending it out to you. However, he would like to have it back when you are through with it."

Now, I call your attention to the handwritten note on that memorandum which reads how, Mr. Baugeard?

A. Well, it is just a note, "Returned actuarial report 9/2/49," and it is in my handwriting.

[fol. 840] Q. Yes. Do you know what that indicates as to where the report in question was returned?

A. Well, it was returned to Mr. Shipman.

Q. And Mr. Shipman was at Alleghany Corporation?

A. Yes, sir.

The Court: Mr. Shipman was an employee of Alleghany Corporation, wasn't he? He had his office there?

The Witness: Yes, sir.

Q. That would indicate that the enclosure was returned to Alleghany Corporation on that date, right?

A. Yes, sir.

* * * * * * * *

[fol. 841] Robert W. Purcell, called as a witness, having been first duly sworn, testified as follows:

* * * * * * *

[fol. 842] Direct examination.

By Updike:

Q. Mr. Purcell, what is your present employment?

A. I am chairman of the International Basic Economy Corporation.

Q. Are you a lawyer, sir?

A. Yes. I have been. I haven't practiced in many years.

Q. Now, going back to 1948, were you in that year a director and vice chairman of Alleghany Corporation?

[fol. 843] A. I was.

Q. And how long did you continue as a director of Alleghany?

A. Until some time in 1953; I think it was March of 1953.

Q. Were you also the legal officer for Alleghany in 1948, '49 and '50?

A. Well, I served as sort of house counsel. We usually had outside counsel, too.

Q. In that period was Mr. J. J. Anzalone also a director of Alleghany?

A. I believe he was a director. I know he was an officer.

Q. Some time after Alleghany acquired control of IDS you became a director of IDS, do you recall that?

A. I do.

Q. And if I state from the record that Alleghany acquired IDS on April 27, 1949, would that give us the approximate date of when you became a director of IDS?

A. I think shortly thereafter.

Q. And did Mr. Anzalone become a director at the same time?

A. I think he did.

Q. And was there a gentleman named Guild who also [fol. 844] became a director?

A. That is correct.

Q. Would it be accurate to say that you and those two gentlemen were the Alleghany nominees to the IDS board?

A. I believe that is a—that's correct, yes.

Q. There came a time when you became chairman of IDS and ceased being president. Can you give us the date when that took place?

A. It was in the fall of 1953. I can't say, September, October, along in there.

Q. Very briefly, sir, in the fall of 1948 did an opportunity come to you on behalf of Alleghany to consider the possibility of the acquisition of IDS?

A. That's correct.

Q. And at that time was there in the employ of Alleghany a man named Charles Shipman?

A. I can't just recall when Charles Shipman came into Alleghany.

Q. You recall Mr. Shipman, however?

A. Oh, very well, yes, but I cannot be sure of the dates.

Q. He testified on his deposition that he started the day after Labor Day in 1948. He has also testified that his [fol. 845] position was as assistant to you, sir.

A. That is correct.

Q. Is that in accord with your recollection?

A. That is correct. I do not recall the date, but he came in as an assistant to me.

Q. In the period between that date in the fall when the IDS matter came to you and, let us say, the first of the following April, did you personally look into the merits and demerits of the acquisition?

A. Yes, I did.

Q. And did you instruct Mr. Shipman to look into them as well?

A. Yes, I did.

Q. Now, was there anyone else that was asked by you on behalf of Alleghany to look into the affairs of IDS as a possible acquisition?

A. Yes. We employed an outside financial man by the name of Stiver to make a separate report, recommendation.

Q. Do you recall that Mr. Shipman, prior to his employment by Alleghany, had been the railroad editor of Standard & Poor's?

A. I believe that is correct.

Q. And he was an experienced analyst, was he not, sir?

[fol. 846] A. Yes.

Q. Do you remember that Mr. Kirby, during the course of your inquiry into the possible acquisition of IDS, sug-

gested that there be an informal subcommittee of the Alleghany board?

A. I don't recall who suggested that. I do know that there was that subcommittee appointed.

Q. Merely for the purpose of refreshing your recollection, I show you Plaintiff's Exhibit 297 for identification, and I direct your attention to the second sentence in the last paragraph on the first page.

Does that refresh your recollection that Mr. Kirby did make the suggestion that an informal committee of the Alleghany board be constituted to look into the IDS acquisition?

A. Well, that is certainly what this says. I am sorry to say I just cannot recall independently that it was Mr. Kirby. I would not want to say that it was or was not. I just don't know.

Q. Well, do you recognize the exhibit, sir, as a copy of a letter which you wrote to Mr. Baldwin Bane at the Securities and Exchange Commission?

A. I think it is. I don't recall. I am sure that it is.

[fol. 847] Q. Do you remember working with Mr. Bateman and Mr. Potter as the other two members of that group?

A. Yes, yes.

Q. Now, in the period between your first starting to look into this and the time when it was acquired, did you discuss the acquisition from time to time with Mr. Kirby?

A. I don't recall any separate meetings I had with Mr. Kirby. It was discussed from time to time in board meetings at which both Mr. Kirby and I were present.

Q. Mr. Kirby, in answer to an interrogatory from us, has referred to various conversations which he had with you and Mr. Young, and these are not under a category with reference to board meetings, so would your recollection be that in addition to conversations at board meetings you did discuss the acquisition from time to time with Mr. Kirby?

A. I cannot recall any specific meetings, but I would not want to say that I did not have any, Mr. Updike. I would expect that probably did.

Q. Now, following the acquisition of IDS, sir, and following your becoming a director of IDS, did you become acquainted with the IDS practice in its internal reports of [fol. 848] projecting its future performance in terms of its net income and so on?

A. Yes, I did.

[fol. 849] Q. I show you Plaintiff's Exhibit 295 for identification which purports to be a facsimile of a letter from you to Mr. Waag, acknowledging receipt of the summary of operations for the first four months of 1949. Was that to refresh your recollection, I now show you the summary of operations for the period ended April 30, 1949, and ask you if you can identify that as being the document receipt of which you were acknowledging in Plaintiff's Exhibit 295?

A. Yes, I think this is the copy of the summary of operations.

Q. Will you tell his Honor, looking particularly at Exhibit B and Exhibit C to the summary of operations before you, how those projections were prepared, if you know?

A. I don't know. They were prepared by the accounting department of IDS in Minneapolis.

Q. Were they prepared by the accounting department in consultation with the various subdivisions or the executives in charge of the various subdivisions of IDS that are identified in the side captions on Exhibits B and C?

A. Yes, I think that's correct.

[fol. 850] Mr. Kissam: May we identify that, there is no number on it?

Mr. Updike: May I have it identified, your Honor, it is only used because it is referred to in a document.

(Plaintiff's Exhibit 400 marked for identification.)

Q. Mr. Purcell, in 1949, after IDS was acquired by Alleghany, you and through you Alleghany acquired consider-

able additional information concerning its operations, isn't that a fair statement?

A. That is correct.

Q. Following that acquisition, you and Mr. Shipman both spent a good deal of time in Minneapolis for that purpose, is that correct?

A. Yes, we went out from time to time.

Q. Did you report to Mr. Kirby and to Mr. Young from time to time with respect to the information thus being acquired?

A. I reported to Mr. Young. This was my invariable practice, to report to Mr. Young and the practice was that Mr. Young kept Mr. Kirby posted to the extent he thought it was necessary. My line of communication was with Mr. Young.

[fol. 851] Q. You had board meetings of Alleghany from time to time during that year, did you not?

A. That is correct.

Q. In the course of the board meetings, did you report with Mr. Kirby present with respect to the developments at IDS?

A. Yes.

Q. Did you report to those meetings concerning the actuarial studies of a concern called Froggatt & Company?

A. I don't think I did, I don't recall.

Q. In 1949, I show you Plaintiff's Exhibit 244 for identification, which purports to be a copy of the monthly projections for that entire year. Did you see that document after the acquisition in 1949?

A. I probably did.

Q. Is it possible that you even saw it before the acquisition in 1949?

A. I don't think so, because this is dated April 12, 1949, just a few days before the acquisition. I don't think I saw it before.

Q. Do you know, Mr. Purcell, whether it was the practice at IDS in connection with the monthly summaries of op-

erations to take the projections from the large sheet which [fol. 852] is Plaintiff's Exhibit 244 for identification and use those figures as the so-called projection figures for the particular month that is covered by the particular monthly summary of operations?

A. I think that's correct.

Q. When you were first going out from time to time to Minneapolis in connection with the affairs of IDS and your activities as a director there, did you receive the monthly summaries for the entire year both for 1949 and for 1950 when it came into existence?

A. I am sure I received the monthly summaries for the months commencing after we had acquired control. I don't know whether I ever received those prior to April 1949.

Q. That isn't quite my question, as to what you received after April 1949. If I asked that question, I regret it. What I am asking is whether a document that is before you, which is the summary by months of the entire year of 1949, came to you in, let us say, June or July of 1949?

A. Whether this particular summary came to me for 1949, this particular projection?

[fol. 853] Q. Yes.

Mr. Whittlesey: Could I have the number?

Mr. Updike: Exhibit 244 for identification.

A. I think I probably did get it, but I don't recall, I used to get the projections.

Q. Were they sent to you in Cleveland or in New York?

A. In Cleveland, my office was in Cleveland.

Q. When you say "my office," was that an Alleghany office?

A. Yes, it was jointly Alleghany and Chesapeake & Ohio Railway Company.

Q. To that extent did Alleghany have two offices, one in Cleveland and one in New York?

A. I think to that extent—the principal accounting office of Alleghany Corporation was in Cleveland, and the principal legal office.

The Court: How long did that go on?

The Witness: Your Honor, I left Alleghany Corporation in 1953, and at that time to the best of my recollection Mr. Anzalone was still in charge of the accounts, and he was still in Cleveland. But some time about that time Mr. Anzalone retired and then the accounts were moved to [fol. 854] New York.

The Court: So in 1959, so far as you know, they were all in New York?

The Witness: By that time, yes.

The Court: Did Alleghany receive these monthly reports from Investors Diversified after it got control of it?

The Witness: I did as a representative of Alleghany kept them in the Alleghany files in Cleveland.

The Court: When the Alleghany were no longer kept in Cleveland, were those files sent to New York?

The Witness: So far as I know, I cannot testify about that, because those files were not under my direct supervision, although to the extent that I kept the files directly myself, these monthly statements, one came every month, and Investors Diversified is a prolific creator of reports, and each month as mine would come in I would discard the one that came in the preceding month. I would keep the year-end files and projections and things like that, but these monthly summaries, I would just keep the current month.

[fol. 855] Q. I show you Plaintiff's Exhibit 262 for identification, Mr. Purcell, and ask you if you cannot identify that in connection with your statement about the prolific generation of reports by IDS?

A. Was there a question?

Q. I ask you if you can identify that in connection with your statement about the prolific reports generated by IDS?

A. I don't think I ever saw this before, but it refreshes my recollection about the prolific nature of the reports.

Mr. Updike: I offer it in evidence.

I will ask one further question, if I may.

Q. Do you recognize that as a list of reports that were being sent to you by IDS after you became a director of IDS?

A. I would say yes.

Mr. Whittlesey: What exhibit is that?

The Witness: Exhibit 262 for identification.

Are you offering it in evidence?

Mr. Updike: Yes.

The Court: What is its significance in this case?

[fol. 856] Mr. Updike: I would like to show the report that came to this witness from IDS because he was a member of the Alleghany board as well as a member of the IDS board.

The Court: He said he got many reports. Your case involves certain reports which you said Mr. Kirby had which Alleghany Corporation did not have. Why not get to these issues. Here you have a lot of reports going to a man in Alleghany Corporation. Why not go to the case and prove that Mr. Kirby had reports which this man did not have.

Mr. Updike: Our case is broader than that.

The Court: All the records of Alleghany Corporation were made available. Mr. Graubard said he had a right to examine all the records of Alleghany Corporation. He went in and took those records and examined them. What you are saying is that Mr. Kirby owed a duty over and above that. You said this morning, when I asked you about it, that there were particular things, projection of earnings, the Froggatt report, the operations report, the reports of IDS to Alleghany. Those were the particular items that you say Mr. Kirby was chargeable with. Why [fol. 857] not get to those things? There is no doubt this witness for Alleghany Corporation was receiving a lot of reports. He says so.

Mr. Updike: If the Court please, my recollection of Mr. Graubard's testimony does not coincide with yours. My recollection is that he testified that Alleghany's files in con-

siderable volume were made available to him in a room over at the Biltmore Hotel, or some such place. However, I do not concede for a moment that all of the files of Alleghany were made available to him, and I believe we can demonstrate that here.

The Court: What files were not made available to him?

Mr. Updike: I am going to come to that, but part of the files were the files that were put together by Mr. Shipman who will be the next witness, who was Mr. Purcell's assistant.

The Court: You want to show these were the files that Mr. Purcell received in Alleghany?

Mr. Updike: Yes, sir.

The Court: For that purpose, I will receive Exhibit 262 in evidence.

Your recollection of Mr. Graubard's testimony is quite [fol. 858] correct, your Honor.

The Court: I have re-read it recently and I remember it very well.

Mr. Kissam: I can refer you to the specific page.

The Court: That is not necessary.

(Plaintiff's Exhibit 262 for identification received in evidence.)

By Mr. Updike:

Q. Incidentally, Mr. Purcell, do you recall that Mr. Stiver made two separate reports on the acquisition of IDS?

A. That's correct.

Q. One was an early or preliminary one and one represented his final views?

A. I believe that is a fact.

Q. I first show you a report which has been marked Plaintiff's Exhibit 358 for identification, actually that is the letter of transmittal, which bears a notation showing that it was introduced before the referee as Defendants' Exhibit 363-B for identification at that point. I will just ask you if you recognize that as being the early or preliminary report?

A. Yes, I think that's correct.

[fol. 859] Q. I show you Plaintiff's Exhibit 252 for identification, which purports to be a report from Mr. Stiver, dated March 15, 1949, and ask you if you can identify that, sir, as the second Stiver report?

Mr. Updike: I am told that this document has been marked Exhibit 310 in evidence, sir.

The Court: All right.

A. Yes, I would say so.

Q. Now, do you recall, Mr. Purcell, there came a time in September of 1949 when Mr. Shipman requested Mr. Waag at IDS to send certain specific IDS reports to Mr. Young and to Mr. Kirby?

A. No, I don't recall that.

Q. I show you three exhibits in evidence, Plaintiff's Exhibit 336, 253 and 257, as being an exchange of correspondence between Mr. Shipman and Mr. Waag, and see if they refresh your recollection.

The Court: Having read them do you have any present recollection?

The Witness: I do not have any present recollection of this, no.

Q. Well, do you recall that Mr. Young and Mr. Kirby were dissatisfied with respect to the amount of written information that they were getting from IDS and that they [fol. 860] called for additional IDS reports through Mr. Shipman?

A. No, I do not.

Q. Do you remember any discussion of that, sir?

A. No, I do not.

* * * * * * *

[fol. 861] By Mr. Updike:

Q. Mr. Purcell, I show you Plaintiff's Exhibit 348 in evidence, which is the summary of operations for the 12-month period ending December 31, 1949, and ask you, sir, if that

is in the regular form of summaries of operations as you recall them, sir?

A. Yes, to the best of my recollection this is in the customary form that the company employed at that time.

Q. Now, you have testified to the documents that were received by you during the period following the acquisition by Alleghany of IDS. Is it your recollection, sir, that those documents or some of them were also being received by Mr. Anzalone?

A. Yes, I think so.

Q. And was Mr. Anzalone physically located in his office out in Cleveland where you also made your office during this period?

A. Yes.

Q. Now, Mr. Purcell, toward the end of 1949 did you have some conversations with Mr. Crabb with respect to the projection of the IDS business for the year of 1950?

A. I don't recall whether I did or I didn't.

Q. Well, I show you what purports to be a copy of a [fol. 862] letter from Mr. Crabb to you, dated December 20, 1949, which has been marked Plaintiff's Exhibit 275 for identification, and ask you if you recall receiving that letter?

A. Well, I am sorry, I don't recall receiving it. I don't recall not receiving it. I do recall that Mr. Ramspeck at the Securities and Exchange Commission wanted some information from me which I had to get from the company out in Minneapolis, and this is the subject of this letter. But I don't recall receiving it.

Q. I direct your attention specifically to the last incomplete paragraph on the first page, which is completed at the top of the second page, and ask you if you recall the five-year projection for 1949 through 1953 that is there referred to?

A. I recall that the company did get out five-year forecasts and sometimes ten-year forecasts and I had copies of those.

Q. Well, in that letter, Mr. Crabb is referring to a specific five-year period, is he not, sir?

A. Yes.

Q. I show you Plaintiff's Exhibit 243 for identification, and ask you if that is the five-year projection to which Mr. Crabb refers in his letter?

[fol. 863] A. Yes.

Mr. Updike: I offer it in evidence, sir.

The Court: Let me see it.

Mr. Phillips: May I see a copy?

The Court: This projection of condensed net income you received then from—

The Witness: I am sure I had a copy of that, your Honor. I am sure that I did.

The Court: And was that kept in your file at Alleghany Corporation?

The Witness: In Cleveland, yes.

The Court: In Cleveland. I will receive it in evidence.

Mr. Whittlesey: It does not seem to me, your Honor, that it in any way connects it with the defendant Kirby or his failure to adduce; therefore I object to it being received on this ground, because it is not connected with Mr. Kirby in any way.

The Court: I will receive it for what it is worth.

(Plaintiff's Exhibit 243 received.)

Mr. Whittlesey: I should point out further, your Honor, that this particular copy came out of the files of IDS—

The Court: I can't hear you.

[fol. 864] Mr. Whittlesey: This exhibit, which has been offered here, and which, by the way, has no date on it, came out of the files of IDS as a result of depositions taken pursuant to your Honor's order in March of this year.

The Court: But the witness says he received a copy and it was in his files of Alleghany Corporation, so I am receiving it in evidence.

By Mr. Updike:

Q. Now, his Honor asked you this morning about the disposition of your files from Cleveland when you left Cleveland to go to IDS; do you recall that, sir?

A. I recall his question, yes.

Q. Do you recall that you testified with respect to this—

Mr. Updike: This is a part of the excerpts that were marked for your Honor this morning, and they were marked not in evidence—

The Court: No, they are marked in evidence.

Mr. Updike: They are now in evidence.

The Court: Let me have it. It is Exhibit 399.

Mr. Updike: This refers to page 4028.

The Court: What page?

Mr. Updike: Page 4028.

[fol. 865] The Court: All right. What is the question?

Mr. Updike: Starting from the middle of the page.

Q. Did you give the following answers to these questions:

"Q. Mr. Purcell, you testified this morning that when you left New York for Minneapolis you took certain of the IDS files with you.

"A. Yes.

"Q. Will you explain to us generally what files you took with you and what became of those files thereafter?

"A. When I accepted the presidency of IDS I was immediately plunged into a very busy schedule, and then I was sick for a week or two, and finally I didn't have any time to review files and decide which I should leave and which I should take. Therefore, with just a minimum amount of sorting, I took all of the files which were in my possession, but they consisted primarily of a volume of reports. This company produces a very large number of reports, many of which I brought here today, that nobody has asked me about. Those files went to Minneapolis and then when I returned from Minneapolis in 1955 I did have

a little better chance to look and see what was there, and [fol. 866] a great deal of it was—represented duplicates of financial reports and monthly statements and things of that kind, and not wanting to bother to ship those back to New York, I discarded those duplicates. Everything else I shipped back to New York and turned over to Mr. Wallace.

"Mr. Daly: May I say that Mr. Wallace has shown to you or Mr. George Martin has shown to you everything that was received from Mr. Purcell in those cabinets referring to IDS. I have no further questions."

Mr. Updike: That is Mr. Daly.

"Redirect examination.

By Mr. Graubard:

"Q. You said monthly reports."

Mr. Whittlesey: What page, Mr. Updike?
Mr. Updike: 4030. It is the next page.

"Q. You said monthly reports.
"A. Yes.
"Q. You did not send those back to Alleghany Corporation, did you, Mr. Purcell?
"A. Not to the—let me say that in 1949 and 1950 I kept my files in Cleveland and reports accumulated so rapidly that I discarded reports in Cleveland. Then I accumulated more reports in New York and I took them to Minneapolis, discarded some of those, those would be 1951 and '52 re- [fol. 867] ports, and I discarded them to the extent that they were meaningless and sent them back, and sent the files back to New York.
"Q. I asked you that question only for the purpose of establishing that you did have monthly reports.
"A. Yes, yes.
"Q. In 1950.
"A. Yes.
"Q. And in 1949.

"A. Yes.

"Q. And that where those reports contained information of an important nature in your judgment you discussed those reports with Mr. Young.

"Mr. Daly: When?

"Q. Or discussed that information with Mr. Young as promptly as possible.

"A. Well, when I felt it of sufficient importance to do that, yes."

Q. Do you recall giving those answers to those questions?

A. Yes.

Q. Now, do you recall that Mr. Wallace testified before the referee that he had found no monthly reports in the Alleghany files?

[fol. 868] A. No, I don't recall.

Q. Do you recall his testifying that there were no projections or forecasts of IDS found in those files?

A. I didn't hear Mr. Wallace testify.

Q. Do you recall whether you were present—

The Court: Where is that testimony? It isn't in this Exhibit 399, apparently.

Mr. Updike: I believe it is, sir.

The Court: Is it?

Mr. Updike: It should be.

The Court: What page then?

Mr. Updike: May I continue with my examination while the page is being found?

The Court: I would like to know that because I have read this exhibit this morning and I would like to know. You say Mr. Wallace, who testified in this exhibit, made a certain statement. I would like to know where it is since you represent that it is there. It may be there, but I want to see it.

Mr. Updike: The first instance is at page 1944, which is the second page, sir. This is Wallace's testimony that is being reported, and Mr. Haudek's request for documents

has been adopted by Mr. Graubard in his interrogation, and at the bottom of page 1944—well, perhaps I should [fol. 869] start on page 1943, sir—

The Court: Well, I have read this exhibit, and the witness was asked if he would have a check made for the existence of any such budgets or forecasts or projections of earnings in any form whatsoever, and Mr. Daly said, "With reference to IDS?"

He said, "Yes," and he said that if they're available, produce them.

Then on page 1944—

Mr. Updike: Mr. Wallace testifies, "There are no such documents in Alleghany Corporation's files unless we find those various reports we were looking for. I would be greatly surprised if such records that would be made at that time the company was buying IDS did not contain—

The Court: Wait a minute, you are misreading that. He said, "I would be greatly surprised if such records that would be made at the time the company is buying IDS did not contain some forecasts."

All right, he said he would be surprised if those records did not contain forecasts. Now, where did Mr. Wallace say he could not find any such records?

[fol. 870] Mr. Updike: I am sure we can find it for you, sir.

The Court: I would like to know, since you made that representation. Where is that in Mr. Wallace's testimony? I would call your attention to page 3060 of this record that you put in this morning:

"Mr. Wallace stated some time ago he was attempting to get from IDS monthly statements of IDS for the period November 30, 1949 through May 31, 1950. Those statements came in today. I will now offer the statements for each of those months."

Mr. Updike: That is right. May I carry your Honor with me a little bit further?

The Court: Where is the statement that those records were not available?

Mr. Updike: If you bear with me, sir, those statements referred to at page 3060 are marked, as I recall, at page 3065 and thereafter, and Mr. Graubard proceeds to question Mr. Young some more. Those monthly reports I showed to Mr. Graubard here, they were introduced in Zenn v. Anzalone and not one of them was a monthly report in the form of a summary of operations and not one [fol. 871] of them contained any projections. So Mr. Young, resuming at page 3169, Mr. Graubard continues with Mr. Young, and he shows him Exhibit 379-B, which is the first of those monthly reports that was just introduced, he questioned him about that, and Mr. Young said that these were the reports that he started to receive, and he said, "Don't send any more to me," that appears at the top of page 3170, and then Mr. Graubard says, "You are certain that no such report or reports influenced your judgment in regard to IDS during the years 1949 and 1950?

"A. I am certain that those reports that were put into evidence this afternoon had not the slightest influence on my decision.

"Q. So far as you know, Mr. Young, were there any other monthly reports other than reports of the type that you have in your hand of a monthly nature concerning which you testified on the deposition taken by Mr. Pomerantz?

"A. I think that when this question came up I asked Mr. Wallace out of some curiosity to find out from IDS just what reports were sent to me at that time, and I have their reply if that would speed things along."

* * * * * * *

[fol. 872] Mr. Updike: May I, your Honor, for the moment withdraw the representation on the undertaking to check the record reference, because we do not have the full record here, and I should like to be able to return to it, if I may.

The Court: All right.

By Mr. Updike:

Q. In 1950, Mr. Purcell, the projections or some projections came to your attention early in the year, did they not?

[fol. 873] A. I think so.

Q. Do you have a recollection as to how early in the year 1950 projections, internal projections from IDS became available to you as a director of IDS?

A. I have no recollection except it did not come to my attention until my return from a trip to Europe, so it could not have been before, I think, April 12th or 14th, when I returned.

Q. I show you a memorandum dated January 24, 1950, which has been marked Plaintiff's Exhibit 286 for identification and ask you if that will refresh your recollection.

A. This memorandum refers to just a projection of the mortgage department, not for the company in its entirety, which I thought was the subject matter of your earlier question.

Q. My question was perhaps that broad. In any event, by the 24th of January or shortly thereafter you did have some projections with respect to operation of the mortgage department, am I right?

A. I think that is correct.

Q. Is it fair to say that the mortgage department had shown the largest single growth in terms of both gross and [fol. 874] net of any department in the year 1949?

A. Yes.

Q. Do you recall, sir, that before you left on your trip to Europe you wrote a letter both to Mr. Young and Mr. Kirby dated February 11, 1950, which has been marked Plaintiff's Exhibit 345 for identification?

A. Yes, I wrote this letter.

Mr. Updike: I first offer in evidence Plaintiff's Exhibit 286 for identification.

The Court: Received in evidence.

(Plaintiff's Exhibit 286 for identification received in evidence.)

Mr. Updike: The exhibit which I have just handed to the witness was an exhibit before the referee in Zenn. I would like to identify a portion of it with reference to another document which is already in evidence.

Q. I turn your attention, Mr. Purcell, to the third page of the exhibit, Plaintiff's Exhibit 345 for identification, specifically to the first full paragraph and the second full paragraph on page 3.

There has been marked in evidence in this case as Plain-
[fol. 875] tiff's Exhibit 351 a document from the files of Mr. Kirby, which consists of a letter and its enclosures, and I draw your attention particularly to the enclosures and specifically to the enclosure marked Exhibit 1, and ask you, sir, if you can by looking at Exhibit 1 and comparing the figures there set forth state whether that was the projection which had come to you with respect to mortgage operation by February 11, the date of your letter which is Plaintiff's Exhibit 345? May I make my point perhaps by a more specific question, Mr. Purcell.

On the first full paragraph, page 3, you will notice the first figure is the funding of $153 million of new loans. Do you see that on Exhibit 1, at the top, sir?

A. Yes.

Q. If you look at the last sentence in that paragraph, there are references to overall interest rate on permanent portfolio mortgages, 4.336 and 4.369, and I invite your attention to the topic VI of Exhibit 1, subdivision (d) and ask you if those figures will help you to identify your source for your letter?

[fol. 876] A. I still could not testify that this was the source, because while those figures to which you refer are the same there are certain figures that appear to be at a variance.

Q. Is there a substantial variance?

A. For instance, in my letter I mention 125 million of new loans committed to be funded in 1950 and the figure here is—

Q. Where is that?

A. The third sentence of the first full paragraph on page 3. I say at year end 125 million of new loans were committed to be funded in 1950. The figure on Exhibit 1 here is 118 million, so it would appear perhaps that there was some other source for me to have gotten the 125 million figure from. I cannot explain that.

Mr. Whittlesey: Might I ask Mr. Updike, if your Honor please, to call the witness' attention to the fact that the document, Exhibit 351, which he is asking the witness to compare with the witness' letter of February 11, 1950, is dated April 25, 1950.

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[fol. 877] Mr. Updike: I would like to demonstrate from this, both this page and one other page in the enclosures, that at least as early as the 11th of February certain of the information was available to this witness and was communicated by him to Mr. Kirby and Mr. Young.

The Court: You are doing that by a letter?

Mr. Updike: Yes.

The Court: Which letter is in evidence?

Mr. Updike: That letter is not yet in evidence, and I would like to offer the letter, if I may.

The Court: Why do we need to spend a lot of time on it? Let me see it.

(Pause.)

The Court: This is a letter from Mr. Purcell to Mr. Young and Mr. Kirby dated February 11, 1950. I take it it came from Mr. Kirby's files, did it?

Mr. Whittlesey: It came from the record before the referee in Zenn, it was Exhibit 327 in the Zenn hearings.

The Court: Mr. Kirby produced this letter before the referee?

[fol. 878] Mr. Updike: It was produced, your Honor.

The Court: What relevancy does it have in this proceeding?

Mr. Updike: I wanted to demonstrate with reference to Exhibit B—

The Court: What relevance has Exhibit 345 got to this hearing?

Mr. Updike: Exhibit 345, sir, shows what Mr. Kirby knew at that particular time, and I am trying to tie into that, sir, a projection which comes from Mr. Kirby's own file as to the year 1951.

The Court: Let us get this in order. This letter of February 11, 1950, you have not yet offered in evidence?

Mr. Updike: I offer it now.

The Court: Exhibit 345 for identification is received.

(Plaintiff's Exhibit 345 for identification received in evidence.)

The Court: That is a letter from Mr. Purcell to Mr. Young and Mr. Kirby dated February 11, 1950.

Mr. Updike: Yes, sir.

The Court: That showed what Mr. Kirby was presumed to have known at the time and that was introduced in evi-
[fol. 879] dence before the referee.

Mr. Updike: That's right.

The Court: In Zenn v. Anzalone.

* * * * * * *

By Mr. Updike:

Q. Do you have any recollection, Mr. Purcell, with regard to the time when the remaining projections for the year 1950 became known first of all to you and Mr. Anzalone as directors of IDS?

[fol. 880] A. Only that it was some time after my return from a trip abroad.

Q. I show you, sir, Plaintiff's Exhibits 240, 241 and 242, being the summaries of operations for the month ending

January 31, 1950, February 28, 1950 and March 31, 1950, in each instance being exhibits for identification, and ask you if you would just glance at them for a moment with particular reference to Exhibit B which I believe contains the projections for the then current year (handing to witness).

The Court: What is your question?

Q. Can you tell us by reference to the date appearing on the face of each of those exhibits about when you received them?

A. The date on the January and February statement is February 12th, and the date on the March statement is April 24, which would lead me to the conclusion that they were mailed to my office some time shortly after those dates. I don't think I returned to my office until some time around April 12th, perhaps the 14th.

[fol. 881] Q. Returned from your trip to Europe.

A. —from my trip to Europe, and when these actually came to my attention, with the accumulation of everything that had developed since my trip abroad, I just can't say now.

Q. Now, sir, I show you Plaintiff's Exhibit 246 for identification, which is the projection for the year 1950 by months of the net income of IDS, and I ask you if you can, by reference to that document, tell his Honor whether it had been prepared before Exhibits for identification 240, 41 and 42?

A. I would assume that the projection was prepared before the monthly figures which contain the projection.

Q. I believe you testified this morning that that was your understanding of the routine.

A. Yes, but, you see, they did not get out the January figures here until April, and this is probably because the projection was in the course of preparation. This is my best recollection.

Q. Yes.

A. However, the projection seems to be dated April 14th and the figure is April 12th, and that was the reason for my hesitancy. I am giving you my best judgment as to what happened. I do not know that I have a very clear [fol. 882] recollection about it.

Mr. Updike: I offer in evidence Plaintiff's Exhibits 240, 41 and 42, and Exhibit 246.

The Court: How do you tie those in to Mr. Kirby?

Mr. Updike: I tie them in to Mr. Kirby by reason of the fact that this witness was a fellow director with Mr. Kirby at Alleghany.

The Court: All right, cross that one off, if that is the best you have got.

Mr. Updike: No, if you will hear me.

The Court: All right, let's get to something relevant.

Mr. Updike: This witness and Mr. Anzalone were the Alleghany nominees on the board of IDS. This witness had written to Mr. Young and to Mr. Kirby on the 11th of February with regard to the projections for the mortgage operations for the remainder of the year.

The Court: That letter is in evidence, the letter that went to Mr. Kirby. Now, can you prove what happened to these documents? Were these in the hands of Mr. Kirby? Are these documents that Mr. Kirby had?

Mr. Updike: We have an exhibit here, sir, that shows [fol. 883] that Mr. Kirby—I say Mr. Kirby—that Mr. Shipman asked Mr. Waag to send to Mr. Kirby the summaries of operations, and that is Exhibit 257 for identification.

The Court: I think Mr. Kirby understands that he could not recall seeing those at all.

Mr. Updike: That's right, I believe that's right.

The Court: Now, what do you say was the obligation of Mr. Kirby to produce something which he says he does not recall seeing at all?

Mr. Updike: Well, it is because, sir—I do not think it is to be presumed that these gentlemen did not talk with

one another. This witness has testified with respect to his talks with Mr. Kirby and Mr. Young.

The Court: You have got to have proof in this case, Mr. Updike. We do not presume anything. You have got to prove it.

Mr. Updike: I understand. Mr. Kirby and Mr. Young were present at director's meetings from time to time. They were interested and concerned with the future of IDS. And we believe that from the testimony of the witness himself, with respect to what happened to his files, plus the testimony to be adduced from Mr. Shipman, that [fol. 884] these will be proved to have gone into the files of Alleghany at or about the time that they bear a date, and we think it is not only what Mr. Kirby actually knew, but that which he should have known in the pursuance of his function as a director of Alleghany and as president of the Alleghany Corporation in circumstances where he was personally acquiring Class A IDS shares from the portfolio of his corporation, Alleghany.

The Court: You want to establish that those were in the files of Alleghany Corporation where Mr. Purcell was, is that it?

Mr. Updike: Beg pardon, sir?

The Court: You want to establish that these documents were in the files of Alleghany Corporation.

Mr. Updike: Certainly some of them at one time went into the files of Alleghany Corporation.

The Court: Now, Mr. Purcell, on his testimony before the referee, at page 4030 was asked whether they had monthly reports, and he said yes. In 1950? Yes. 1949? Yes.

Now, those were reports apparently that he received in Alleghany Corporation that you are talking about there. [fol. 885] Now, on this transcript of the testimony before the referee, at page 4029, Mr. Daly said that Mr. Wallace has shown to you—that is the examining attorney—everything that is received from Mr. Purcell in those cabinets referring to IDS.

Mr. Updike: Yes. So now here is Mr. Graubard asking if there are these monthly reports.

The Court: And they said yes.

Mr. Updike: He asked the witness whether there were monthly reports, but Mr. Graubard has seen what is in the Alleghany files, and he obviously has not found these.

The Court: Why do you say obviously?

Mr. Updike: Because Mr. Graubard would not be asking the question of the witness if he had them exhibited to him. He is continuing to press for information.

The Court: Mr. Graubard on the stand here testified that he found everything that he thought was essential for his case, and in this transcript of the testimony before the referee, Exhibit 399, Mr. Daly said to Mr. Graubard, Mr. Wallace has shown to you everything received from Mr. Purcell, and the witness said he had the reports.

[fol. 886] Now, I am a little lost in this. I know you have got a wealthy client who is paying you well for each day that you spend on this, but I do not get any more depending how long I sit here, and I don't want to waste any time. I want to bring this to some kind of conclusion.

Mr. Updike: Well, I do not want to waste the Court's time, your Honor, but I submit to you—

The Court: Let me find out; where are these relevant so far as the liability of Mr. Kirby is concerned?

Mr. Updike: It is because these show—first of all, will your Honor agree with me that they show a value or a bearing on the value of IDS Class A shares as of—let's take the latest date that the witness refers to—I think he said it was April 28th. On April the 28th—

The Court: The balance sheet shows the value, sure.

Mr. Updike: They show earnings projected for these very shares.

The Court: Where were these? You come in the middle of the thing and you show something to the witness and he says, "Yes, I recall those." Then you offer them in [fol. 887] evidence. Now, where were they? How do you

connect them up with Mr. Kirby? That is the thing. Where were they?

Mr. Updike: Some of them we believe were in Alleghany's files, and they never were shown to Mr. Graubard.

The Court: There are two steps. One. You say they are in Alleghany files; two, they weren't shown to Mr. Graubard.

Now, establish those facts; one, they were in Alleghany's files; two, they weren't shown to Mr. Graubard. That is the way to try the case.

Mr. Updike: Mr. Graubard himself testified at page 346—

The Court: Wait a minute, take your first one. Prove where they were.

Mr. Updike: Well, I cannot do that through this witness, I do not believe, sir.

The Court: All right. Then if you cannot prove that—

Mr. Updike: Not through this witness.

The Court: You have got them identified, and when you have got them proved as related to Mr. Kirby then offer them in evidence. You have got to have something relating [fol. 888] them to Mr. Kirby before I will receive them in evidence. You do not know where they were, apparently; at least you haven't any evidence of where they were.

Mr. Updike: We know at least that they were in the files of IDS and Mr. Kirby was the president of the controlling stockholder of IDS, and we have Mr. Kirby's files.

Mr. Whittlesey: Your Honor, may—

Mr. Updike: May I finish? We have Mr. Kirby's files produced here showing that he had the summaries of operation for the 12 months ending December 31, 1949.

The Court: I think there is no doubt about that.

Mr. Updike: I think this shows, this puts upon Mr. Kirby a knowledge of the existence, that this is the way IDS did business, and he was under a duty, if he was going to make a full and frank disclosure, to—

The Court: Now, Mr. Updike, you get so involved in this case, you go off in orations on every possible point,

and leave the essential point. If you keep your eye right on the ball, you have got particular documents you are offering in evidence. I am simply saying that they are [fol. 889] identified. As soon as you have got them connected up with Mr. Kirby I will receive them in evidence. But the mere fact that this witness said what he did does not mean that they are evidence against Mr. Kirby at this point.

Therefore, I won't take them at this point, but you can offer them when, as you say, you will be able to prove that they were in the files of Alleghany Corporation.

All right. Well, let us get that proof and then we will admit them. Meanwhile, we will hold them.

Mr. Whittlesey: I might say this, your Honor—

Mr. Updike: I think I have connected it with Mr. Kirby by showing that Mr. Kirby was the president of Alleghany and that Alleghany was the controlling stockholder of IDS, and that these were things that he either knew or should have known.

The Court: Mr. Kirby, when he was on the stand, said he did not see those documents.

Mr. Whittlesey: Your Honor, as controlling stockholder of IDS, that gave Alleghany the power to nominate a majority of directors to the board and nothing more, certainly not to call upon IDS to produce any of its records or anything, and the best proof of that is right here.

[fol. 890] In answer to our interrogatories, as to what Mr. Kirby failed to adduce, we got this stream of documents specified. We then called on Mr. Updike to give us copies. After about a week he says, "We haven't got them in Alleghany, they are out at IDS, and IDS won't give them to us," although Alleghany controls IDS. It was only pursuant to an order made by your Honor to take depositions in Minneapolis that this material which Mr. Kirby is supposed to not have adduced, that was the only way we got it pursuant to a court order, even though IDS is today controlled by Alleghany.

The Court: When you get those properly tied in to Mr. Kirby I will receive them in evidence, but until then—

Mr. Phillips: Your Honor, I think I am under an obligation to state to you that from April, 1959, to April, 1960, Alleghany Corporation was not the controlling stockholder of IDS, but John D. and Clint W. Murchison brothers, doing business as Murchison Bros., were the controlling stockholders, and it has been so found by the SEC and so represented in all the prospectuses of IDS during the period in question.

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[fol. 891] By Mr. Updike:

Q. Mr. Purcell, do you recall that the affairs of IDS were audited by a firm of actuaries and perhaps accountants, if that is the right term, known as Joseph Froggatt [fol. 892] & Company?

A. Yes, I recall that.

Q. And I show you Plaintiff's Exhibit 220 and 221 for identification, being the report of Joseph Froggatt for April 29, 1949, and May 22, 1950, respectively, and ask you if you saw either or both of those at or about the date they bear?

A. Well, I believe I saw one or the other or both of them somewhere around that time.

Q. And was it your practice to review those findings with respect to whether or not IDS was going to be able to meet its face amount of certificate maturities as they came due?

A. Well, review them with myself?

Q. Yes, study them as a director of IDS.

A. Yes, I considered that matter.

Mr. Updike: I similarly offer these in evidence, your Honor, as two documents that did not come to the attention to the referee and which on our theory of the case were documents that Mr. Kirby either knew, as to 220 for identification, by reason of the correspondence identified by

Mr. Baugeard this morning, or should have known, and therefore I believe they are admissible against—

[fol. 893] The Court: Let us find out what happened to these documents. Mr. Purcell said he saw them. What did he do with them?

Q. Do you have any recollection, sir, as to what you did with them?

A. Well, I am not sure that I ever had copies of these documents in my files, Mr. Updike. I cannot testify as to that.

The Court: You did see them?

The Witness: I saw these. I recall seeing them in Mr. Crabb's office in Minneapolis on one of my trips out there, and I don't know whether I ever had copies of these or not.

The Court: Do you know whether Mr. Kirby had copies or not?

The Witness: No, I would have no information on that at all.

Q. Did you ever discuss with Mr. Young and Mr. Kirby the future prospects for IDS in the period before, say, May the 1st, 1950?

A. Oh, I am sure I did with Mr. Young, and I simply cannot say as to Mr. Kirby. My contact was always with Mr. Young, Mr. Updike.

Q. Well now, wasn't there a directors' meeting early in [fol. 894] 1950 at which Mr. Young and Mr. Kirby were present, in the course of which the future of IDS was under discussion?

A. I don't recall. I missed a board meeting or two on my trip abroad, Mr. Updike, and I don't recall.

Q. Going back to the board meeting of December 6, 1949, at which you may recall the resolution was adopted which permitted the officers of Alleghany to acquire Class A shares of IDS in exchange for Alleghany preferred stock, do you remember that meeting? Do you remember that there was such a meeting?

A. I remember there was such a meeting. That action was taken.

Q. Now, at that time, in addition to Mr. Kirby and Mr. Young, you and Mr. Anzalone were qualified as officers of Alleghany owning preferred stock of Alleghany to participate in the offer by Alleghany, were you not?

A. I don't think I was, Mr. Updike.

Q. Well, weren't you vice chairman at that time?

A. Yes. Well, I guess I could have participated had I owned any of the preferred stock, but I don't think I owned any preferred stock.

Q. Now, at that meeting was there any discussion of the future of IDS that you recall?

[fol. 895] A. I'm sorry, it is too long ago for me to recall that, Mr. Updike. I don't recall.

Q. As you attended that meeting would you say that you and Mr. Anzalone were the only two people present who were familiar with the projections of IDS with respect to its future business?

Mr. Whittlesey: No testimony that Mr. Anzalone was familiar at all.

The Court: He is not asking you, Mr. Whittlesey. He is asking the witness.

A. Well, I am sorry, I cannot recall. Perhaps if you would show me the minutes of the meeting or something else, I might. I don't know who was there or what was discussed.

Q. While we are looking for that, Mr. Purcell, I show you what has been marked Plaintiff's Exhibit 206 for identification, which purports to be a certified copy of the minutes of the board meeting for December 6, 1949, and ask you if you will refresh your recollection from reading it.

Mr. Kissam: Do you have the Zenn number on that?

Mr. Updike: It looks like 27, but it is very difficult to read.

A. Now, what was the question, Mr. Updike?

[fol. 896] Q. My question was whether you recall whether there was any discussion at that meeting of the future prospects of IDS.

A. I'm sorry, this doesn't refresh my recollection. The minutes don't refer to any such discussion as I have read them hastily.

Q. Was it planned in advance that this topic would come up for consideration at that meeting, Mr. Purcell?

Mr. Whittlesey: Your Honor, I wonder if we aren't getting into retrying Zenn v. Anzalone now, and not the question of facts relative to the financial condition or prospects of IDS which Mr. Kirby knew and failed to adduce before the referee?

The Court: Well, that is one of the dangers of this presentation, but I will allow the witness to answer the question.

The Witness: Would you read the question back, please?

(Question read.)

A. I think this topic was on the agenda, Mr. Updike.

Q. I show you what purports to be a copy of the agenda which has been produced from the files of Mr. Kirby, marked Plaintiff's Exhibit 337 for identification, and ask [fol. 897] you if you can identify that.

A. It is not specifically mentioned here, although item 6 on the agenda is to consider resolutions authorizing exchange offer to the corporation's prior preferred and series A preferred stockholders, together with appropriate resolutions in connection therewith, and I think that encompasses it.

I believe this did not just come up for the first time at that meeting, I don't think.

Q. Well, Alleghany had for some years been authorizing these exchange offers, had it not?

A. That's correct.

Q. Was this the only instance in which the offerees of the offer consisted of the officers of the corporation that you can recall?

A. Yes.

* * * * * * *

[fol. 898] Q. I believe earlier, Mr. Purcell, I showed you the projection by months for the year 1949, and my recollection is your answer was that you saw that some time in the course of 1949, but only after the acquisition by Alleghany of IDS. Am I right in that?

A. I think that is what I testified to. That was the practice and they gave me copies of projections and monthly statements, and this was a projection and I presume I got it.

Mr. Updike: I offer it in evidence.

The Court: Just let me ask one question:

How do you tie this to Mr. Kirby?

Mr. Updike: I tie it to Mr. Kirby because he was on notice from Exhibit 348 that this was the procedure at IDS, he was on notice from his conversations with this witness and with Mr. Young that IDS worked in this manner and this was part of the available material. If he did not in fact personally know about it, he should have known about it.

The Court: This is projected in the income for the year 1949 by IDS. The witness says he received it and Mr. Kirby, being an officer of Alleghany, I presume, he might have been able to look at it.

[fol. 899] Mr. Whittlesey: This witness received it as a director of IDS. Mr. Kirby was not a director of IDS.

The Court: I realize that. I will take it in evidence for what it is worth.

(Plaintiff's Exhibit 244 received in evidence.)

The Court: We will take a five-minute recess at this point. I would like to have the report of the referee in Zenn v. Anzalone.

(Short recess.)

By Mr. Updike:

Q. In the recess, Mr. Purcell, we checked the record with respect to the proxy statement of Alleghany Corporation for the annual meeting of stockholders to be held on May

3, 1950. I show it to you, Plaintiff's Exhibit 199 for identification, merely for the purpose of refreshing your recollection that you were an owner and holder of Series A preferred stock of Alleghany on the 6th of December, 1959, and for that purpose I direct your attention merely to the third full paragraph on page 5 of the exhibit.

A. Well, this would indicate that I had some shares but had exchanged them for American Power & Light Company [fol. 900] stock.

Q. My refreshing of your recollection was to refresh you with respect to your status on the 6th of December, 1949, which is prior to the tender date that you referred to there. In other words, on December 6, 1949 you were the owner and holder of 500 shares of Series A preferred of Alleghany.

A. It would appear I held them until January 20, 1950, and then tendered them for the American Power & Light.

Q. Will you agree with me that on December 6 you had 500 shares?

A. It must be that I did, I had forgotten about that, I knew I did not tender any in exchange for IDS.

* * * * * * *

[fol. 901] By Mr. Updike:

Q. Mr. Purcell, do you recall, sir, that some time in 1954 some actions were commended, derivative actions were commenced on Alleghany's behalf which involved, among other claims, a claim arising out of this exchange of IDS Class A stock for preferred stock of Alleghany?

The Court: Mr. Purcell was a defendant in that case.

A. If that is the case you are referring to, that is correct, I was named as a defendant.

[fol. 902] The Court: And you testified before the referee on the adequacy of the settlement?

The Witness: That's correct.

The Court: Did anybody ask you for any particular paper?

The Witness: I was served with a subpoena duces tecum which was a very broad one indeed and I brought volumes of documents to court with me when I was called upon to testify.

The Court: And they were all available for the attorneys?

The Witness: Yes.

The Court: Did that include these papers that Mr. Updike is referring to, these projections of earnings?

The Witness: I am sorry to say I cannot say just exactly what I had, because I did not have a list and I did not keep them. It could have, your Honor, because I don't think it would have included the January, February and March statements, because those were monthly statements which in due course I discarded. I may have kept the projections as a director of the company. If I kept them, I would have brought them, because I responded to the subpoena.

[fol. 903] Q. Now, Mr. Purcell, following the commencement of those actions, is my recollection correct that while you were named as a defendant you were not served?

A. I was never served.

Q. Did you however ask Mr. Waag some time in June or July of 1954 for information from his files with respect to that subject matter, the 1950 IDS transaction?

A. I may have. I recall at some time I checked some information to try to recreate the conditions which existed in 1949 and 1950 concerning IDS.

Q. I show you, sir, Plaintiff's Exhibit 362 for identification, which purports to be a letter on the letterhead of IDS from Mr. Waag addressed to you, and ask you if you received the original of that letter (handing)?

A. Yes.

Q. That letter, as I read it, refers to three enclosures, one is a condensed statement of net income for 1949 and 1950 by quarters. It is in the first sentence, Mr. Purcell.

A. Yes.

[fol. 904] Q. I show you Plaintiff's Exhibit 363 for identification and ask you if you can identify that as the enclosure.

A. This is a condensed statement of net income for the years 1949 and 1950 by quarters, and I presume that is the statement.

Q. I show you Plaintiff's Exhibit 364 for identification and ask you if you can identify that as the second enclosure?

A. It appears to be. I don't recall receiving these, but it would appear to be.

Q. I show you what has been marked as Plaintiff's Exhibit 365 for identification and ask you if you can identify that as the third enclosure?

A. I am inclined to believe this is not the third enclosure, this is what is called the comments on the operation, and the letter refers to the summary of operation which was in a somewhat different form. It may have been, but I am inclined to think not.

Q. May I show you this section of the exhibit where the term "summary of operations" does appear.

A. Summary of operations appears on one of the inner pages here. It could be.

Q. I show you what purports—

[fol. 905] Mr. Kissam: Could you read into the record the Zenn exhibit numbers? I know one is 97 and one is 98—363 I think is Exhibit 97 and 364 is I think 98; is that right?

Mr. Updike: Only two of these were Zenn exhibits. Those numbers you give are correct.

Q. Mr. Purcell, I show you what purports to be a longhand note consisting of two pages dated July 27, 1954, from you to Mr. Young, which has been marked Plaintiff's Exhibit 366 for identification, and ask if you can identify that as your note?

A. What was the question?

Q. Do you recognize that note as being in your handwriting?

A. Yes, this is my handwriting.

Q. I draw your attention to the fact that on page 2 of that exhibit you refer to the last enclosure as "comments on operations," a distinction that you just drew in your testimony a moment ago.

A. Yes.

Q. Specifically, if you will look at the figures that you mentioned on the second page of your letter, will you see, sir, if they tie into the figures that appear on page 2 of [fol. 906] Plaintiff's Exhibit 365?

A. Yes, they do.

Q. Did you send those on to Mr. Young at or about that date?

A. Yes.

Mr. Whittlesey: What date is that?

Mr. Updike: July 27, 1954.

If the Court please, I offer them in evidence.

The Court: Let me look at these documents you are offering in evidence and then tell me how they relate to Mr. Kirby.

Mr. Updike: I first direct your Honor's attention to the letter from Mr. Waag to Mr. Purcell dated July 26, 1954. Your Honor will note that on the second page of that letter Mr. Waag is stating to the witness that he is enclosing a summary of operations for the year 1950.

I draw your Honor's attention to the fact that this is evidence being assembled in connection with the litigation, and as appears from the witness' letter to Mr. Young it is to prepare Mr. Young for Mr. Young's conversation with Mr. Pomerantz who was the attorney for the plain-[fol. 907] tiff, general counsel for the plaintiffs.

Now, in this letter from Mr. Waag to Mr. Purcell he says that this projection—I am now reading from the second paragraph on page 2, the second sentence—"This projection"—

Mr. Kissam: For identification?

Mr. Updike: Yes, for identification.

"This projection was most likely completed in January of 1950 which would indicate that we anticipated a considerable improvement in our mortgage operations."

I next direct your Honor's attention to page 2 of the summary of operations, which is the wide sheet. That wide sheet shows that there had been projected as income from operations the figure of 5992, which is identified in Mr. Purcell's longhand note. It also shows that the sum of 8,600,000 was actually received in that year.

Then Mr. Purcell's note says to Mr. Young, preparing Mr. Young for his conversation with Mr. Pomerantz, that this may not be too helpful as income from operations in 1949 was only 1,515,401 dollars.

Your Honor, the record will show that of the three enclosures that came to Mr. Purcell only two were offered [fol. 908] and received as exhibits before the referee, and the third one—the third also enclosed was never adduced before the referee.

The Court: Which is the third one?

Mr. Updike: The last one, which Mr. Purcell—

The Court: The handwritten letter?

Mr. Updike: Yes, and discusses as being not too helpful since income from operations was only one million 515 and projected at 5992, and turned out to be 8,600,000.

The Court: You say that this handwritten letter addressed by Mr. Purcell to Mr. Young should have been produced by Mr. Kirby before the referee?

Mr. Updike: I say, sir, that these documents were found—

The Court: I am asking you about this document. Is that what you say?

Mr. Updike: Yes, sir.

The Court: A handwritten letter by one defendant to another in a lawsuit should have been produced by a third defendant in a hearing before the referee?

Mr. Updike: Yes, because the letter that is in your hand [fol. 909] and the enclosures were in Alleghany's files.

The Court: All I am interested in is, you say the enclosures were not produced before the referee except for this handwritten letter?

Mr. Updike: I beg your pardon.

The Court: Certain of them were introduced and then you say the one you are talking about was this handwritten letter.

Mr. Updike: The handwritten letter was not introduced, and likewise the enclosure which is the summary of operations which refers to the projection for 1950, which is Plaintiff's Exhibit 365 for identification, was not adduced before the referee.

Mr. Whittlesey: That I take it is undated.

The Court: You mean this document which starts "Condensed financial information" and then goes on with the statement of the income and earned surplus?

Mr. Updike: Yes, sir.

The Court: That was not introduced, you say, before the referee?

Mr. Updike: That's right.

Mr. Whittlesey: My objection is that there is no date on that document, there is nothing to show when it came [fol. 910] into existence. We have this Plaintiff's Exhibit 260 for identification, the unsworn guess of an officer of IDS as to when it may have come into existence, but I would scarcely suggest that that is true.

The Court: Where is the proof that this Exhibit 365 was something which Mr. Kirby had?

Mr. Updike: There is no proof that Mr. Kirby had it, but there is proof that these documents were in Alleghany's file at the time when the referee was hearing the case.

Mr. Whittlesey: I might point out—

The Court: How do you know they were in Alleghany's file, Mr. Purcell's statement that he received them?

Mr. Updike: That is where the plaintiff's attorneys located them.

The Court: In Alleghany's files?

Mr. Updike: Yes.

The Court: Were they in Alleghany's files at the time Mr. Graubard went through those files?

Mr. Updike: That I cannot say, except for Mr. Graubard's lack of recognition of certain of these projec-
[fol. 911] tions when he was here upon the stand.

Mr. Whittlesey: These apparently went to Mr. Purcell in 1954, to his farm in Cape Vincent. He was not then a director of Alleghany. We therefore say it does not follow they were in Alleghany's files.

The Court: What proof is there that they were in the files of Alleghany Corporation at the time of the hearing before the referee?

Mr. Updike: I will ask your Honor to take them subject to that connection.

The Court: I am not taking them subject to connection. This is too complicated a record to take something subject to connection. You prove they were in the files of the Alleghany Corporation and I will receive them as being in the files of the Alleghany Corporation.

I don't see that this handwritten letter from Mr. Purcell is admissible in any event. That is a communication from one defendant to a second defendant, and you say the third defendant should have introduced it in evidence.

Mr. Kissam: Neither of whom are defendants in this action.

[fol. 912] Mr. Updike: It is evidence to show that this information was being assembled for the purpose of presenting it to a plaintiff's counsel in connection with the then-pending litigation, and it is admissible.

The Court: I realize that, that one defendant was communicating with another defendant, but you say the third defendant had an obligation to take that letter and take it around to the referee. No indication that Mr. Kirby got it; no indication that it was his letter, sent to him at all. 366 I will not receive in evidence.

Mr. Updike: This is in the category—there are several of them, sir.

The Court: Several of what? Not handwritten letters.

Mr. Updike: No.

The Court: The other documents, if you can establish that they were in Alleghany's files, I will receive them in evidence.

Mr. Updike: Very good, sir.

The Court: Those are documents 365, 362, 363 and 364 for identification. You have identified them. If they are in the files of Alleghany Corporation, if you prove that, I will receive them in evidence.

[fol. 913] 366, being the handwritten note from Mr. Purcell to Mr. Young, I will not receive in evidence.

Have you finished with Mr. Purcell?

Mr. Updike: Perhaps I can just cover it generally.

By Mr. Updike:

Q. Mr. Purcell, do you recall that there was a firm of accountants who had been doing the accounting work for IDS called Rossiter & Company?

A. Yes, I do.

Q. And as the accounts were completed year in and year out, and specifically with reference to the years 1948, '49 and '50, did you see those reports at or about the time they came out?

A. Yes, I think so.

Q. That might not be true—I did not mean to ask an unfair question—with regard to 1948 because that may have been in existence before Alleghany acquired control.

A. Yes.

Q. Now, likewise, do you recall that there was an accounting firm named Millar, MacDonald & Company, which did the work for ISC, Investors Syndicate of Canada?

[fol. 914] A. Yes, I recall.

Q. And do you recall seeing the reports of Millar, MacDonald & Company as well, as those reports came through?

A. Yes, again with the reservation about 1948, I am not absolutely sure about 1948.

Q. Mr. Purcell, do you recall that when the acquisition was originally negotiated it was contemplated that Investors Syndicate of Canada was to be left with Mr. Gamble and that thereafter there was a rearrangement with respect to that?

Mr. Whittlesey: Your Honor, I question the relevancy of all this.

A. No.

Q. You do not recall?

The Court: The witness has answered.

A. There was no such arrangement.

Q. All right. Do you recall that in 1950 you had a discussion with Mr. Kirby concerning the substitution of Peat, Marwick, Mitchell as the accountants for IDS in place of Rossiter?

A. I recall that they were substituted, but I do not recall a discussion with Mr. Kirby about it. I might have had one, but I don't recall it. I know that Mr. Kirby wanted [fol. 915] to have the substitution take place.

Mr. Updike: If the Court pleases, I am finished with this witness.

The Court: You are finished with this witness? Is there going to be any cross-examination?

Mr. Whittlesey: I have a few questions.

The Court: All right. We have got ten minutes more to go before we adjourn.

Cross examination.

By Mr. Whittlesey:

Q. Mr. Purcell, I believe that you told us that you were elected a director of IDS very shortly after Alleghany had acquired majority stock interest in IDS, is that right?

A. That's correct.

Q. I do not know that you told us how long you continued as a director of IDS.

A. I continued as a director uninterruptedly until, I believe it was, 1959 when I was not reelected by the shareholders.

Q. Now, at one time you were president of IDS also, were you not?

A. Yes, I was.

Q. And you became president approximately when?

[fol. 916] A. The latter part of March, 1953.

Q. I see. And continued as president until when?

A. Oh, about September of the same year or October.

Q. And then you became chairman of the board, would that be right?

A. That is correct.

Q. And continued in that capacity until when?

A. My guess is that it was not too long after, around May, 1955, when the control of IDS was transferred to Murchison Bros.

Q. Directing your attention to the period in 1949 after you became a director of IDS until the middle of 1950, do I have an understanding that after you became a director you familiarized yourself with the financial affairs of IDS?

A. That is correct.

Q. And in the course of doing that you went out to IDS during the summer of 1949 quite frequently, did you not?

A. Yes, I think so.

Q. And you continued to do that up into the early months of 1950, until you went abroad?

[fol. 917] A. Yes, I think that is correct.

Q. And in the course of those trips you conferred with the principal officers of IDS, did you not?

A. Yes.

Q. With respect to its financial problems at the time?

A. Yes.

Q. Its financial prospects?

A. Yes.

Q. And the problem of meeting its certificate liabilities, amongst other problems, right?

A. Yes.

Q. In the course of that would it be right to say that you examined the internal operating reports of IDS?

A. I think that is correct.

Q. Bearing on all of these problems, its financial condition, financial prospects?

A. Yes.

Q. Problems of meeting certificate reserves?

A. Yes.

Q. Do you recall that you went down to the SEC and had various meetings with representatives of the SEC with [fol. 918] respect to the question of IDS's ability to properly meet its certificate liabilities?

A. That is correct.

Q. And its reserves. Do you recall that—I believe you do recall because you have identified a letter which you wrote to Mr. Young and Mr. Kirby on February 11, 1950—

A. Yes.

Q. —in which, amongst other things, you show that projected income for 1950 from mortgage operations alone would be some $8,315,000 gross, is that right?

A. I believe that was the figure.

Q. And in that memorandum you reviewed other financial problems of IDS as they had arisen during the nine months that you had been familiarizing yourself with those problems, is that right?

A. That is true.

Q. Would it be correct to state, Mr. Purcell, that between 1949, when you went on the board of IDS, and up until the time that you were testifying in the hearings before the referee, that you were the director of Alleghany Corporation who was most directly and closely familiar with the financial problems of IDS, particularly with respect to the years 1949 and 1950?

[fol. 919] A. I believe that is a correct statement, Mr. Whittlesey.

Q. Now, I believe you told us that you were subpoenaed to testify before the referee in the Zenn v. Anzalone, and

that you were served with a subpoena duces tecum; is that right?

A. That's correct.

Q. Do you recall that that subpoena called upon you to produce all documents, records, agreements, notes, and memoranda relating to the control, business, finances and operations of Investors Diversified Services during the period 1949 to the date of that subpoena?

A. I think that is correct. It is a very broad subpoena.

Q. And in response to that broad subpoena can you describe what you produced?

A. Well, I got together all of my files and reports and everything that I could, and I remember coming into the courtroom with an enormous briefcase in one hand and a great enormous red manila folder under my other arm, and brought them all into court.

Q. And delivered them to who, do you know?

[fol. 920] A. Well, I think I delivered or tendered them to Mr. Graubard who had subpoenaed me.

Q. I see. And you then testified before the referee?

A. That's correct.

Q. And do you recall that you were on the stand for a full day?

A. I think that is right.

Q. And do you recall approximately how many attorneys were present at your examination?

A. A room full.

Q. By a room full, about how many?

A. Oh, I would say 12 or 15 or 20.

Q. Now, referring to your testimony as there given do you recall that amongst other things you testified to the IDS financial records, the general description of those records which you had received in 1949 and 1950, as a director of IDS?

A. Well, I think so.

Mr. Updike: Well, I submit that the record is the best evidence of this, and that is this line of questioning is tending in the direction of a retrial of Zenn—

The Court: No, this is a question of whether the records [fol. 921] were available, that is all. I am not going into the question of whether the Zenn-Anzalone case was a good case or not, but I do want to find out whether Mr. Kirby had any obligation to produce something that was not produced. I think these questions are relevant to that.

Q. Do you recall that you were also asked to testify and did testify—

Mr. Updike: Is there an answer on the record? I did not hear the witness' answer to the earlier question.

The Court: I think he is reframing the question.

Mr. Whittlesey: No, I thought he had answered.

The Witness: I think I answered the question.

The Court: Did you? All right. Let us have the next question.

Q. And do you recall that you were also asked to testify and did you testify at this hearing with respect to the problem of the adequacy of IDS certificate reserves in 1949 and 1950?

A. Yes.

Q. And that you testified as to the steps that were taken in 1949 and 1950 to put the reserves on a sound basis?

[fol. 922] A. Yes.

Q. Do you recall that you also testified with respect to the over-statement of IDS's consolidated income in 1949 in connection with its sale at a premium of mortgages to its subsidiaries?

A. Yes.

Mr. Updike: I submit this line of questioning just goes to the merits of Zenn v. Anzalone.

The Court: It goes to the question of what was revealed to the Referee and therefore bears upon the issue you have tendered.

* * * * * * *

New York, April 16, 1963,
10:30 A.M.

(Trial resumed.)

Mr. Updike: Mr. Charles Shipman.

CHARLES SHIPMAN, called as a witness, having been first duly sworn, testified as follows:

Mr. Updike: Perhaps the record should note, your Honor, that at the close of yesterday's session Mr. Purcell asked if he could arrive late this morning.

The Court: So I understand; he had an important meeting this morning.

Mr. Updike: That's right. So we are proceeding with this witness out of turn to that extent.

The Court: When Mr. Purcell comes back, he will be subject to cross-examination or any other examination.

Mr. Updike: Yes, sir.

[fol. 924] The Court: I understand.

Direct examination.

By Mr. Updike:

Q. Mr. Shipman, we have heard in this case about Shipman reports to Alleghany with respect to the affairs of IDS in 1948, 1949 and 1950. Are you the Charles Shipman who wrote those reports, sir?

A. I am.

Q. Would you tell his Honor when you first came to work for Alleghany?

A. The day after Labor Day, 1948.

Q. Very briefly, prior to that time who had been your employer?

A. Standard & Poor's Corporation, which previously had been known as Standard Statistics until it was merged with Poor's, and prior to that the Wall Street Journal.

Q. For how many years had you been with Standard & Poor's?

A. 14.

Q. What post did you occupy immediately before coming to work for Alleghany?

A. Head of the railroad department, railroad editor of Standard & Poor's.

Q. When you came to work for Alleghany, what was [fol. 925] your title, if any?

A. Assistant to the vice chairman of the corporation.

Q. That was Mr. Purcell, was it?

A. Yes, sir.

Q. Where did you make your office, sir?

A. New York.

Q. In the Chrysler Building?

A. Chrysler Building, yes, sir.

Q. How long did you remain with Alleghany, just to get the scope of your direct employment?

A. Through 1952.

Q. Through December of 1952?

A. Yes, sir.

Q. Did you thereafter continue to do some sort of consulting work for Alleghany?

A. I did.

Q. In the fall of 1948, were you assigned a task with respect to a possible acquisition of a concern then called Investors Syndicate?

A. Yes, sir.

Q. Who gave you that assignment?

A. Mr. Purcell.

Q. Very briefly, what did you do about it, just in gen- [fol. 926] eral?

A. First I talked to a representative of Bear, Stearns & Company, Don Lillis, who had brought—

Q. Will you spell that, please for the reporter?

A. L-i-l-l-i-s. He had brought to the attention of Alleghany the possibility of acquiring IDS, he was in the position of a finder with respect to this deal. And discussed with him the possibilities of acquiring it, the possible range of price and something about the company of which prior

to that I had known nothing. Then, I made as complete a study as I could of IDS, I should say of Investors Syndicate, in the manuals, that is, Standard & Poor's manuals, Moody's and so forth, whatever material was to be found in the SEC files in Washington, and I also undertook a trip to Minneapolis, where I represented myself as a possible purchaser of the face amount certificates of Investors Syndicate, and also possibly of mutual shares of Investors Mutual, because it was very difficult to get information otherwise.

I could not get any direct information from the head office of the company in Minneapolis or the mortgage department except on the basis of being a prospective purchaser of their shares. I must say this, that obviously I [fol. 927] did not want to disclose the interest of Alleghany Corporation.

Q. I was going to ask you that. Were your instructions, at least in the early stages, not to disclose Alleghany's interest?

A. That's right, or that anyone was interested in possibly purchasing the interests of Mr. Gamble and his associate in this situation. I believe at that time I also talked to Bert Gamble at Gamble-Skogmo in Minneapolis and, of course, as far as he was concerned, I also had to be a little careful at that stage.

Q. Now, Mr. Shipman—

A. I beg your pardon, let me complete my answer. I also visited some banks in Minneapolis and tried to get some information there.

Q. The work that you have just described took place over a period of, say, from December or December 1948 until perhaps March or April of '49?

A. Yes, sir, except that I did additional digging, of course, and I went to see a friend of mine at Kidder Peabody & Company who was closer to the I.S. market than most people in the street and did have a little additional information.

[fol. 928] Q. And by the I.S. market I take it you mean Investors Syndicate?

A. Yes, sir.

Q. Now, you testified on your deposition, I believe, that the information in the public sources was skimpy. Is that your present recollection, sir?

A. Yes, sir.

Q. Did there come a time when Mr. Purcell, through Mr. Gamble, got you access to some information out at IDS?

A. You mean before the purchase?

Q. Yes, sir.

A. Well, I believe I got some information from Mr. Gamble, yes, on a second trip to Minneapolis, I believe.

Q. During this period did you discuss IDS with Mr. Kirby?

A. During this period? Not to my recollection.

Q. Well, specifically—

A. Oh, yes, after I made my report, after I made my report.

Q. I show you Plaintiff's Exhibit 300 for identification, and ask you if that refreshes your recollection that you [fol. 929] had a conversation with Mr. Kirby on December 20, I believe it is, 1948, out in Morristown?

A. Oh, yes, yes, of course. I did not realize that I had made no memorandum, I had issued no memorandum or anything prior to that. Oh, I do remember the conversation quite well.

Q. Would you give his Honor just the substance of it?

A. Well, I told Mr. Kirby that I thought that on a preliminary basis I had become very much convinced that Investors Syndicate would represent a wonderful purchase for Alleghany if we could get it at anything like the terms that had been talked about. I told him something about the company. He knew nothing about it. It was my impression, by the way, that I had issued, that I had prepared some kind of a report prior to that, purely factual,

giving detailed information of a purely factual nature about what IDS was, what the constellation of companies were, and what they did and so forth.

However, regardless of that, I discussed with Mr. Kirby the fact that the company was in pretty bad shape, in pretty bad odor, it had had trouble with the SEC on vari- [fol. 930] ous counts, one in connection with alleged misrepresentations in the selling of securities and two, in connection with the accumulation rate, the accumulation of reserves to take care of maturing certificates, and that also there was no asset value for the common stock on the basis of the market, and—well, there was no asset value for the common stock.

The market did place some value on the common stock, but the company was under water, as we would say, but that basically it had tremendous potentialities, and furthermore, a look below the surface would disclose also that these potentialities, at least to a considerable extent, could be expected definitely to be realized.

Q. Did Mr. Kirby ask you any question about leverage in connection with the purchase?

A. I don't recall whether he asked me about it. We talked about it, certainly.

Q. Would you state briefly what leverage means?

A. It means basically the utilization of relatively large —utilization of a junior position for a common stock in the situation whereby the senior requirements, although heavy, once realized, once taken care of, give tremendous [fol. 931] potentialities to the common stock. It works both ways, by the way. That is, that—

Q. If it succeeds, it succeeds with—

A. It succeeds big.

Q. —leverage and if it fails—

A. That's right. Leverage really means a lot of requirements ahead of the common stock. That is basically what leverage means.

Q. Mr. Shipman, there is a reference in Plaintiff's Exhibit 312 for identification to a trip you made to Minneapolis that apparently was reported to Mr. Baugeard. Did you know Mr. Baugeard?

A. Yes, sir.

Q. And was he, like you, a securities analyst?

A. Yes, sir.

Q. Did you discuss with him during this period the information that you were acquiring with respect to IDS for Alleghany?

A. I did.

Q. Did he make requests of you from time to time for specific information sought by Mr. Kirby, at least so far as his conversation with you was concerned?

A. Yes, he did.

[fol. 932] Q. There is a reference in this memorandum to your bringing back a pile of further information from Minneapolis.

A. I might say that Mr. Kirby also asked me—

Mr. Kissam: May we say that memorandum?

A. —to satisfy him with regard to the soundness of the Investors Syndicate acquisition, specifically the financial risks; he wanted some assurance regarding the financial risks, one, whether or not Alleghany would be involved, might conceivably be involved, Alleghany itself, in any trouble over Investors Syndicate, and two, the question of whether or not there were sound actuarial practices in IDS or Investors Syndicate and what assurances I could give him on that.

Q. In that connection, sir, do you recall speaking to a gentleman named Shelby Cullom Davis?

A. Yes, sir.

Q. Will you briefly tell his Honor concerning that?

Q. Well, Shelby Davis, whom I had known in the Society for Security Analysts, had been Assistant Superintendent of Insurance of the State of New York, and had consider-

[fol. 933] able familiarity with actuarial practices, at least

in so far as they related to insurance companies, and without going into any great detail, because we did not really examine documents together, he did give me a favorable response.

Q. I show you Plaintiff's Exhibit 323 in evidence, which purports to be a memorandum from you to Mr. Kirby, dated April 12, 1949, and first I will ask you to read it to yourself, then ask you if that memorandum was prepared and sent by you in response to Mr. Kirby's inquiry that you have just been speaking of.

A. Yes, sir.

Q. Now, do you recall visiting with the actuarial people at the C & O to seek out the reputation of Froggatt & Company?

A. Well, not at the C & O, but Mr. Buck, who had done work for C & O in its pension plan, I visited with him, in his office in New York.

Q. He was then independent consultant?

A. Yes, sir.

[fol. 934] Q. Excuse me for interrupting. Did you obtain from him the information that you laid out in this memorandum of April 12th?

A. Yes, sir, he and his associate.

Q. Mr. Shipman, passing to the time after Alleghany acquired control of IDS, did you obtain alone or with Mr. Purcell access to the internal operating records of that company?

A. Yes, sir.

Q. Did you spend considerable time in Minneapolis following the acquisition for that purpose?

A. Yes, sir.

Q. Will you tell his Honor the extent, in a general way, of the time that you spent in Minneapolis in that connection?

A. Oh, I would go up once a week and stay a couple of days, sometimes I would stay as long as a week. I would live part of the time in Minneapolis.

Q. In the course of those visits, did you come to meet the heads of the various divisions of IDS?

A. Yes, sir.

Q. Can you tell us from recollection what the divisions were?

A. The president, Earl Crabb; the vice president for [fol. 935] public relations, Harold Bradford; the treasurer, Mr. James Racey; the head of the accounting department, Norman Waag; the head of the investment department, Gaylen Van Meter, whose headquarters, by the way, were in New York and I saw a good deal of him; Frank Hatch, who was directly responsible for the securities investment department in Minneapolis; Don Ryan, who was head of the mortgage department, and his assistant—I cannot think of his name offhand.

Q. His name is not important, just the departments themselves.

A. A great many of them.

The Court: For my information, Mr. Shipman, what was Investors Syndicate doing at that time, how did its business operate?

The Witness: Investors Syndicate at that time operated in this way: one, it still had outstanding certificates, face amount certificates which it had sold prior to 1940, and it serviced those certificates, and, of course, had to maintain a reserve against them and invest those reserves.

The Court: Those were certificates really of an investment trust, were they?

The Witness: No.

[fol. 936] The Court: What were they?

The Witness: They were known as face amount certificates.

The Court: I did not quite understand how that operated. They sold face amount certificates, certificates redeemable at a certain date at a certain amount?

The Witness: That's right, a face amount certificate, and payments were made in instalments over a period of years to Investors Syndicate, and each certificate carried

a face amount, and the obligation of Investors Syndicate was to pay at the maturity of the certificate everything that the investors had paid in, plus compound interest which was called an accumulation rate.

The Court: And the money they got from that they invested in securities?

The Witness: Mortgages and securities, primarily mortgages. They had to invest their money in mortgages or securities legal for insurance companies in the State of New York. They serviced those certificates.

Q. May I interrupt for just a second. I believe you once compared the face amount certificate business to endow- [fol. 937] ment insurance without the insurance or death benefit feature. These were instalment contracts, did they have cash surrender value provisions in them that were analogous to insurance contracts?

A. Yes, sir, they did.

Q. So that at any particular year end or anniversary of the certificate, the specific amount that was due by way of cash surrender was specified in the certificate, am I correct?

A. Yes. You are asking about the activities of Investors Syndicate, that was a small part of it.

The Court: What was the big part?

The Witness: The big part of it was underwriting and selling through a sales force of 1,700 salesmen the face amount certificates of its wholly owned subsidiaries, Investors Syndicate of America, Investors Syndicate Title and Guarantee Company, and also the Mutual shares of its affiliates, Investors Mutual, Investors Selective Fund and at that time Investors Stock Fund. It sold those certificates all over the country, also sold those mutual shares. Secondly, it serviced the certificates for Investors Syndicate of America, that is, it helped to collect instalments when due, followed up anything that might be delinquent and [fol. 938] so on.

The Court: Redeemed them?

The Witness: That's right. In addition to that, it also acquired mortgages for Investors Syndicate and sold them to Investors Syndicate at some premium. In addition to that, it managed all of the security portfolios of the various investment trusts and, in fact, of Investors Syndicate of America also. Further, it carried out a mortgage business of its own in the acquisition of mortgages not only for its own account and the account of its subsidiaries, but also for resale to "Fanny May" or to insurance companies, and it would usually try to keep the servicing on that business.

In addition to that, it made construction loans. In general, that covers the activities of Investors Syndicate at that time.

Q. Just so it may be clear, do I understand that Investors Syndicate itself had not sold any additional certificates since 1940?

A. None of its own certificates.

Q. In 1940 it had organized a subsidiary called Investors Syndicate of America?

A. I believe 1941.

[fol. 939] Q. Whose certificates it sold. Was that a company registered under the Investment Company Act of 1940?

A. Yes, sir, it was.

Q. Whereas IDS itself was not so registered, am I correct in that?

A. Yes, sir; you are correct.

Q. The salesmen in addition to selling the face amount of the certificate—

A. It was not eligible under the Investment Company Act of 1940.

Q. The salesmen who were selling the face amount certificates for Investors Syndicate of America also acted as salesmen of shares in these fund companies which his Honor perhaps had in mind when he used the term "investment trust"?

A. Will you repeat that.

Q. The salesmen in addition to selling face amount certificates of Investors Syndicate of America also sold shares in the fund companies which his Honor may have had in mind when he used the term "investment trust"?

A. Yes, sir.

Q. IDS or Investors Syndicate was the underwriter of [fol. 940] those shares for the funds?

A. Yes, sir.

Q. It also had a management contract with the fund companies, am I right about that?

A. Yes, sir.

Q. We have in evidence here, Mr. Shipman, a group of three pages marked Plaintiff's Exhibit 331, which consists of a memorandum from you addressed to Mr. Kirby dated August 5, 1949, with which was enclosed a letter or a copy of a letter, and on top of which is a memorandum which was identified by Mr. Baugeard. I ask you if you will first read those to yourself.

Mr. Updike: I see Mr. Purcell is here, your Honor.

(Discussion off the record.)

A. Yes, I have read them.

Q. Mr. Shipman, do you remember the sending of the memorandum to Mr. Kirby?

A. Yes, sir.

Q. I show you Plaintiff's Exhibit 220 which is the Joseph Froggatt & Company report, dated April 29, 1949, and ask you if that was the actuarial report that was referred to? [fol. 941] A. It seems to be. It had buff covers as I remember. But this seems to be a photostat of the inside of the report.

Q. There was a special Froggatt report earlier that year and this, I believe, to be the latest one referred to.

A. Yes.

(Witness temporarily excused.)

ROBERT W. PURCELL resumed:

Cross examination.

By Mr. Whittlesey:

Q. Yesterday, as you recall, I was asking you about the various matters relating to IDS financial condition and prospects which you were asked to testify about and had testified about when you were called to testify before Referee Fitzsimmons in the Zenn hearings. In that connection, do you recall that you testified with respect to certain profits which you in your testimony characterized as non-recurring profits from real estate operations which IDS received in 1949 and was expected to receive in 1950.

A. Yes.

Q. You used that phrase "non-recurring profit" in your testimony. What did you mean to indicate?

[fol. 942] A. IDS had participated in a number of special real estate developments which resulted in profits, but which was not a regular line of business which would assure any profit during the following year or years to come. Perhaps the most spectacular of these profits was the profit which came into IDS in the latter part of 1950, resulting from the sale of its participating interest in a very large housing and commercial development in California known as Lakewood. This was several million dollars. You could not expect that profit to recur annually.

Q. Those profits were profits from so-called mortgage operations, is that not right?

A. That is correct.

Q. Those are the profits, projected profit, which in February, 1950, you advised Mr. Young and Mr. Kirby could be expected in that year in your memo of February 11, 1950, to them; is that right?

Mr. Updike: This seems to me to be a recapitulation of what took place before the referee in Zenn and therefore is going to the merits of the transaction.

The Court: Mr. Updike, one of the issues you presented here yesterday was that Mr. Kirby did not have presented [fol. 943] before the referee facts necessary for a fair determination of the issue. Now, Mr. Purcell was there and gave testimony that has a direct bearing on that issue. Mr. Kirby does not have to come in and say "Me too," if Mr. Purcell says something. If Mr. Purcell put the fact before the referee, it seems to me that is a perfectly proper bit of testimony to put in. I will overrule your objection.

(Question read.)

A. That's correct.

Mr. Whittlesey: That letter is in evidence in this case and it was in evidence as Exhibit 327 before the referee in Zenn.

Q. Mr. Purcell, is it not a fact that in 1950 the principal item of increased income to IDS lay in this matter of profit from mortgage operations?

A. That is correct, and the profits were even greater than had been projected because the Lakewood sale took place in 1950, and it had not been intended that it would take place in 1950.

Q. When in 1950?

A. The latter part of the year of 1950. We sold the Lakewood project, our interest in it, and used those profits to bolster our certificate reserves which were inadequate [fol. 944] at that time.

Q. Would it be fair to state, Mr. Purcell, that apart from this item of profit from mortgage operations in 1950, all other items of income of IDS remained about the same as they had been in 1949?

A. That is my recollection, that is correct.

Q. You remember also in testifying before the referee that you testified with respect to questions that had been raised by the Minnesota Banking Commission regarding the qualification of IDS's investments?

A. Yes, I remember.

Q. You testified that during the course of your examination you noted on the record that although you had produced substantial records of your own in response to the subpoena, no questions were asked of you with respect to those records, is that right?

A. Well, my—

Mr. Updike: Wouldn't the record itself be the best evidence of this?

The Court: There is a long record before the referee. If you can clear up one or two things like this, all I am interested in, as I said yesterday, is one other document that Mr. Kirby is supposed not to have revealed to the referee, and what is the situation about that? That is [fol. 945] the whole issue we have in this case.

Now, Mr. Purcell has those documents or comparable documents there and was not asked for them, I don't see how you can hold that against Mr. Kirby.

Mr. Updike: I don't believe Mr. Purcell has testified either here or there to the specific documents that he had with him.

The Court: You had him on the stand most of yesterday and you did not ask him about those documents. I was trying all day long, Mr. Updike, to have you mention particular things that you say Mr. Kirby should have produced, and if Mr. Purcell knew about them, why didn't you ask him about them.

Mr. Updike: I showed the witness and he has identified all of these projections that I have claimed should have been produced by Mr. Kirby.

The Court: He identified them. Did he have them present at the time? That is the question Mr. Whittlesey is asking, did he have them present at the hearing before the referee.

Mr. Updike: I did not so understand from Mr. Whittlesey's question.

[fol. 946] The Court: He asked what papers he had and whether any were asked for.

Q. Did you answer?

A. No, I have not answered yet.

[fol. 947] (Question read.)

A. I can't recall whether any questions were asked of me or not. I know that Mr. Graubard reviewed some of the items which I brought and some others, a large number of other items I brought, and nobody asked me about, although they were there and I had tendered them to Mr. Graubard. There were both files and financial statements and projections and reports and matters of that character.

Q. In responding to that subpoena, Mr. Purcell, did you bring with you everything in your possession which came within the scope of that subpoena?

A. Yes, I did.

Mr. Whittlesey: Your Honor, I would like to offer an exhibit the full transcript of Mr. Purcell's testimony before the referee in the Zenn hearing. Part of that, I believe, has been put in by Mr. Updike, and I believe you told me that I might supplement his offer.

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[fol. 948] (Defendant Kirby's Exhibit K-353 received.)

By Mr. Whittlesey:

Q. Now, Mr. Purcell, during 1955 and 1956 Alleghany Corporation did not own voting control of IDS, is that right?

A. That is correct. The transfer of voting control, as I recall it, occurred in May, I believe, of 1955, April or May.

Q. I believe you testified—

The Court: At that time IDS control was transferred to the Murchison brothers.

The Witness: That is correct.

Q. I believe you testified yesterday that in 1949 and 1950 one of your duties for Alleghany consisted of acting as its house counsel.

A. That is correct.

Q. Is that right? And in that connection did you have some familiarity with the written offers made by Mr. Anzalone and by Mr. Young and by Mr. Kirby to exchange Alleghany preferred stock owned by them for shares of IDS Class A stock owned by Alleghany?

A. I believe so, yes.

Q. And do you recall that in connection with those written offers you wrote a memorandum to Mr. Young, in [fol. 949] February, just before you left for Europe, February 1950?

A. Would you show it to me?

Q. Well, I will show you a memorandum and ask you if that refreshes your recollection, K-254 for identification.

A. Yes, I wrote this memorandum.

Mr. Whittlesey: I would like to offer this memorandum in evidence, and I might say, your Honor, that it was an exhibit in the Zenn hearings as No. 331.

The Court: Let me see it.

What is the significance in this case, Mr. Whittlesey?

Mr. Whittlesey: Just this, your Honor:

You will recall that the plaintiff offered in evidence as Exhibit 346 a memorandum written by Mr. Anzalone to Mr. Kirby on March 3rd, 1950, from the face of which it is apparent that the tender offers made by Mr. Kirby were not executed on January 20th.

Now, I am offering this to show that on February 22, by this memorandum which Mr. Purcell wrote, it was equally apparent that those tender offers, although dated [fol. 950] January 20, 1950, had not even as late as February 22, 1950, been actually executed, because that issue on that showing made before the referee was actually litigated. In other words, what I am stating is that the additional proof here offered in the form of the Anzalone memo offers nothing to the facts, the factual issue or the legal issue raised in respect to the date on which these tenders were made.

The Court: What has that got to do with whether Mr. Kirby brought the proof forward before the referee? I know the referee had that issue before him, but I am not deciding the issue which was before the referee.

Mr. Whittlesey: Naturally I know that, your Honor. I think it disposes of any charge of failure by Mr. Kirby to adduce the fact that the tender offers were signed subsequent to January 20, 1950, because that fact had in fact been adduced before the referee.

The Court: And the referee's report refers to that. I read it last night.

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[fol. 951] Redirect examination.

By Mr. Updike:

Q. Mr. Purcell, you were asked about the papers that you produced for Mr. Graubard's inspection and Mr. Pomerantz's and the other lawyers who were representing the plaintiffs or the objectants before Referee Fitzsimmons.

Do you recall that, sir?

A. Yes.

Q. Now, do you tell his Honor that you produced at [fol. 952] that time the monthly projections for 1949 which are in evidence here, which you identified yesterday?

A. No, I did not so testify.

Q. I wish to make it clear, did you produce before the referee the monthly projections for 1950?

A. I don't recall whether I had those particular projections or not.

Q. Did you produce any of the five-year projections which you identified yesterday?

A. I do not know whether I did or not. I may have, and I may not have. I had a large package of reports, including some projections, because it was my practice to keep those projections.

Q. Now, yesterday afternoon, sir, you will recall that you identified a letter to you of July 26, 1954, from Mr.

Wang, which contained three enclosures. One enclosure was marked Plaintiff's Exhibit 363 for identification, another enclosure, which related to the real estate projects was marked 364 for identification.

Do you remember, sir, that both 363 and 364 were produced and placed in evidence before the referee?

A. Is that Referee Fitzsimmons?

[fol. 953] Q. Yes, sir.

A. I don't remember whether they were or not.

Q. Well, I now ask you with reference to Plaintiff's Exhibit 365, which is the exhibit which on the first page refers or is described as comments on operations, and which in the latter spread sheet pages appears under the caption of summary of operations, and I ask you, sir, if you produced that or a copy of it before the Referee Fitzsimmons?

A. Now, your question with respect to Exhibits 363 and 364 did not ask whether I produced; it asked whether they were produced, and I do not know.

Q. Yes, that is correct, and if you do not know I will take that answer, because we can verify that independently from the record itself.

The Court: Well, now we have got a question about—

A. With respect to 365 you asked if I produced it.

Q. If you produced that or a copy of it, sir.

A. I cannot testify that I did. I cannot testify that I did not.

The Court: Was a copy of that in your file?

[fol. 954] The Witness: It may have been and it certainly was at some time, because this is a year end statement. My practice was to discard the monthly statements as they came in, to keep the projections and to keep year end statements so that year to year comparisons could be made, and I did this as a director. But for me to state that I remember having this particular one before Referee Fitzsimmons, I cannot so testify. I do not know.

Q. Do you recall whether you produced any of the so-called Froggatt reports that you stated you were familiar with yesterday?

A. I cannot be positive about that, but I have testified that I did not think I had copies of the Froggatt reports and if that is the case, then I did not produce them. My impression is that I did not, but I could well have produced the projections. Some of the projections I know that I did produce, but this was a fairly old one.

Q. Well, now, can you tell us which projection you produced other than the generalization, if I may call it that, the reference in your letter of February 11th to Mr. Kirby and to Mr. Young with respect to the future of the mort-[fol. 955] gage operations; did you produce any other projections besides that, if that can be called a projection?

A. I am sure that I produced the 1955 projections, and these projections normally were for five years in advance, and I would be quite sure that I had 1954 with me, and it is a reasonable assumption that I had 1953.

As I go back further I can be less sure because I do not know how many of those I had. I simply cannot say. But the projections, it was my practice to keep, so that I could from year to year compare the performance with the projection.

So I cannot testify any more clearly than that. I brought everything that I had and it was my practice to keep the projections.

Q. Did you personally assemble the files for this testimony that you gave, sir?

A. Yes, I would say that I did. I asked my secretary to bring me everything, and she brought it in, and I looked it over, and packed it up and took it to court.

Q. As far as your recollection now goes, you do not testify, as I understand you, to producing the projection [fol. 956] by months for 1949 or 1950, the five-year projections in which the '49 year was the first year, or the year '50 was the first year, and you do not now recall producing any projections earlier than 1953 or possibly '52?

Mr. Whittlesey: Objection.

The Court: Objection sustained to the form of the question. It is a summation rather than a question.

Mr. Updike: I apologize. I will divide it up.

Q. Am I right that you did not produce projections by months for 1949 or '50, such as you identified here yesterday?

A. I don't remember whether I did or not. I don't want to testify that I did and I certainly do not want to testify that I did not. I just don't remember.

Q. That is my understanding of your testimony. There was a five-year projection in which the earliest year was 1949 that you identified yesterday.

A. That's correct.

Q. There was a five-year projection in which the first year was 1950. Is your recollection the same with respect to [fol. 957] those two, that is, that you now cannot state that you produced either one of them?

Mr. Whittlesey: That unfairly characterizes the witness' testimony, your Honor.

The Court: Well, the witness can answer.

A. I cannot testify that I produced them. I cannot testify that I did not produce them. But according to my normal practice, I would have had those projections.

Q. And as I understand it, you have no recollection of having produced Plaintiff's Exhibit 365 for identification?

A. I would have to say that my answer was the same. My practice was to keep the year end statements, so I might very well have had these, but I do not remember, and I do not have them in my possession any longer, so I cannot check.

Q. Well, doesn't it refresh your recollection if you look at Plaintiff's Exhibit 362 for identification that you asked Mr. Waag to furnish you information that was enclosed there?

A. This doesn't refresh my recollection that I asked him for a copy of the December 1950 report. The other in-

[fol. 958] formation which he produced was actually prepared especially to answer some question. This was a copy out of the files.

Q. The other two exhibits

A. As I recall it

Q. Plaintiff's Exhibit 363 and 364 for identification, were prepared specially?

A. Well, I think so, because the company did not prepare reports by quarters covering 1949 and 1950.

Q. I understand that.

A. I mean, that was a special report that he prepared.

Q. Didn't he prepare this in response to your request that it be prepared?

The Court: You mean 363 and 364?

Mr. Updike: Yes, sir.

A. I would assume so, but the letter does not say so. I would assume that he did, because it would be logical that he did.

Q. Well, these were specially prepared; they were sent to you?

A. Yes.

Q. There is no reference to any request from anyone [fol. 959] else, will you agree with me that that is so, Mr. Purcell?

A. Could I see those two, please?

Q. Surely.

A. I would be almost certain that Plaintiff's Exhibit 363, being a condensed statement of net income for the years 1949 and 1950 by quarters, was prepared especially because of some request which I made of Mr. Waag.

Q. Yes, sir. Now, that request actually was in connection with—

The Court: Wait a minute, he hasn't finished his answer.

Mr. Updike: Oh, excuse me.

A. And I would be quite sure that Exhibit 364, being an analysis by quarters of the larger items included in

commissions and participation per project fees, was also prepared specifically at my request because this obviously is not a regular form.

Q. A standard, regular form?

A. This is just an analysis of the larger items which was no doubt prepared to be sent to me with the letter of July 22nd. Item 365, which was a regular form which [fol. 960] he sent me, does not appear to have been prepared at my request and does not appear to have been sent to me at my request. It is volunteered.

The Court: That was a standard form?

The Witness: That was a standard form that all directors received copies of when prepared.

Q. Now, Mr. Purcell, isn't it the fact that you requested this information from Mr. Waag in connection with preparation for the then pending litigation known as *Zenn v. Anzalone* either in the State Court or the Federal Court?

A. I think that is probably correct.

Q. And isn't that clear, if you look at your longhand note —

A. Yes, that is correct.

Q. In fact, you were getting the information for Mr. Young's preparation for that litigation, were you not?

A. Yes, that is true.

Q. Now, won't you agree with me, sir, that one of the questions that you had asked Mr. Waag was to reconstruct for you the basis, looking backward, the basis for the large increase in IDS's earnings in the year 1950?

[fol. 961] A. Well, I don't think it was the basis. I think it was what actually happened in 1950. I wanted to refresh my recollection and find out specifically what had happened to cause this great big bulge in the income in that year.

Q. Yes. Now, when Mr. Waag concludes his letter by reference to Plaintiff's Exhibit 365, doesn't he do so as part of the answer to your inquiry concerning what was known with respect to the future earnings in the forepart of 1950?

Mr. Whittlesey: It seems to me, your Honor, that Mr. Upslike is just arguing with the witness.

The Court: What has this all got to do with the issue of the case? I don't quite understand where you are driving at. I just want it for my own edification, Mr. Upslike.

Mr. Upslike: Well, now, your Honor, we have here a letter

The Court: I know what we have, but what does it have to do with the issue of the case?

Mr. Upslike: The witness transmitted to Mr. Young three enclosures as well as the covering letter from Mr. Wang. [fol. 962] The Court: That's right. He said this yesterday.

Mr. Upslike: Yes. Neither the covering letter nor the one exhibit that contains projections for the year 1950 ever was produced, although Exhibit 3 your Honor asked me yesterday were these in Alleghany's files. They were produced, Exhibit 363 was produced, Exhibit 364 was produced

The Court: You say Mr. Young had them and Mr. Kirby did not produce them, is that what you say?

Mr. Upslike: I say that Alleghany had them, and that it was part of Mr. Kirby's responsibilities to see to it that a full and frank disclosure was made.

The Court: Now, what bothers me about that is the testimony in this case is uncontradicted that the Alleghany files were made available to the attorneys for the plaintiff stockholders.

Now, if they were in Alleghany's files, then they were available. Now, what you have been saying that Mr. Kirby had some things in Morristown that he did not produce, and that is why this leaves me a little bit confused. You are [fol. 963] saying now they are in Alleghany's files, but Alleghany's files were disclosed.

Mr. Upslike: Well, I do not read Mr. Graubard's testimony as saying that he saw or that anybody else connected with him saw all of Alleghany's files.

The Court: I think that is undoubtedly true, but what is the responsibility there? The responsibility was to make

them available. Now, Mr. Graubard said they were all made available, and the attorneys representing the plaintiff stockholders had a right to look at them. If they looked at them and did not think this was useful, well, that was their prerogative.

Mr. Updike: Well, I think your Honor can conclude as a matter of law that Mr. Graubard might have missed one, Mr. Pomerantz and his team might have missed two, but out of the mass of documentation that Mr. Purcell has told us that was generated by IDS, and through Mr. Shipman we will trace it into the Alleghany files, I think it is clear that the Alleghany files were not exposed to Mr. Graubard, were not exposed to Mr. Pomerantz.

The Court: You will have to present some proof on that. [fol. 964] Now, Mr. Purcell does not know that.

Mr. Updike: I have the proof in my hand, sir.

The Court: No, you are saying they did not produce them before the referee, but the files were made available to the attorneys. If they did not want to produce that, that was their responsibility. I cannot see that Mr. Kirby can be charged with that. There is no obligation other than to say, "Here are the records and do with them what you want."

Mr. Updike: Well, if your Honor please, it seems to me that one could conclude, your Honor could conclude that Mr. Graubard and Mr. Pomerantz and Mr. Haudek never saw Plaintiff's Exhibit 365 for identification or they never saw any monthly projections for 1949 or 1950 or any of those five-year projections because from their very nature—

The Court: Mr. Graubard is a very careful lawyer; so is Mr. Pomerantz.

Mr. Updike: Yes, indeed.

The Court: So if those were available for them and they thought they would be helpful in their case I think they [fol. 965] would have seen to it. What they thought might be helpful to them in their case was for them to decide. I cannot see that you can charge Mr. Kirby with the responsibility for something like that.

Mr. Updike: Well, it seems to me, sir, that if Mr. Kirby entrusts the responsibility to some extent of his being a director of Alleghany, if he entrusts some of that responsibility to Mr. Young, then Mr. Kirby cannot avoid accepting the consequences of whatever Mr. Young may have done, and I do not say that it was Mr. Young and I do not say for a moment that it was Mr. Purcell, and I do not know who is responsible.

The Court: You have got me completely lost because I thought up to now you were saying Mr. Kirby had some documents that he was secreting in Morristown.

Mr. Updike: I say that also.

The Court: Now you are saying they were in the files of Alleghany Corporation.

Mr. Updike: Well, from the beginning, sir, my position, which I have obviously not made clear, is, we say that Kirby failed to produce, to adduce before the referee [fol. 966] documents and facts which were known to him and other documents and facts which he should have known in the exercise of his responsibilities as a director of Alleghany, as the president of Alleghany, and as a proponent of the settlement before the referee, as well as before this Court in December of 1959.

The Court: All right. All we are talking about are these particular documents. It turns out now that Mr. Kirby did not have them, they were in the files of Alleghany Corporation. Where do we go from here?

Mr. Updike: In view of the fact, sir, that two of the three enclosures were produced from Alleghany's files, were marked in Zenn, I re-offer Plaintiff's Exhibit 362, 363, 364 and 365 on the ground that there is proof that they were, all of them, in Alleghany's files.

The Court: Well, all right, but where does that get us? Suppose they were in Alleghany's files? How does that tie in to your issue that you yourself have tendered, that Mr. Kirby failed to produce certain facts?

Mr. Updike: Because we say, as a director, as president [fol. 967] in a self-dealing transaction, as a proponent—

The Court: That leaves me cold. Certainly Zenn against Anzalone raised the question of a self-dealing transaction.

Mr. Updike: Yes, sir.

The Court: If I were trying that I might have reached a conclusion that Mr. Kirby was responsible for a lot of money. I understand that issue very definitely. But we are not trying that issue. We are trying the issue here that you have presented us to whether Mr. Kirby failed to adduce certain facts that he was obligated to produce before the referee.

Now, you produce something which you say comes from the files of Alleghany Corporation. Now, how do you prove that those were the documents that he was called upon to produce when the evidence is undisputed that the files of Alleghany Corporation were all made available to the referee and to the attorneys representing the stockholders?

Mr. Updike: Well, your Honor has the view that that is what the record shows, but I submit to your Honor—

[fol. 968] The Court: There is no proof that they were not. Certainly Mr. Graubard—

Mr. Updike: I hold the proof in my hand. Here are two documents that were produced out of Alleghany's files and made available to Mr. Pomerantz or Mr. Haudek; they were put in evidence by them out of—

The Court: What is your proof that the other one was not made available? That it was not put in evidence?

Mr. Updike: Yes, sir.

The Court: I do not think that is sufficient. I will refuse to receive them in evidence on such a slim basis as that.

What is the next question, Mr. Updike?

By Mr. Updike:

Q. Mr. Purcell, Mr. Whittlesey brought out that there was a change in control in IDS, that during this period 1954, '55, '56 and so on, you continued to be a director of IDS, did you not, until some time in 1958 or '59?

A. That's correct.

Q. Did you ever have any difficulty in getting documentary information out of IDS if you wanted it?
[fol. 969] A. No.

* * * * * * *

[fol. 970] Q. I show you Plaintiff's Exhibit 350 for identification, which is a copy of a letter from you addressed to [fol. 971] Mr. Kirby and produced from Mr. Kirby's files dated May 9, 1950, and I ask you if you can identify it, sir?

Mr. Whittlesey: I object to this as being not proper redirect.

The Court: I doubt if it is proper redirect, but if it is some little document that Mr. Updike wants to get identified, I am not going to stop him. However, we are not going to have these examinations go in in a series of chapters, Mr. Updike. You had a full chance and now theoretically all you should be concerned with is anything that was covered on cross-examination. I am not going to have you cut off if you want a document identified.

Mr. Updike: I will have no question in that category, sir.

A. Yes, I recognize this document.

Mr. Updike: I offer it in evidence, if the Court please.

Mr. Whittlesey: If your Honor please, I would like to point out that a letter obviously was in Alleghany's files addressed to Mr. Young at the Alleghany office, therefore—

The Court: This arrangement was also covered, as I [fol. 972] recall it, in the proxy statement which was certainly available to everybody.

Mr. Updike: The thing which was not covered in the proxy statement but which was in issue before the referee was whether or not anybody could go out and buy 20,000 shares of Class A stock of IDS and get it for anything like $8.15 a share. Mr. Young had so testified before Referee Fitzsimmons.

The Court: Maybe Mr. Young was not telling the truth, that wouldn't be unusual. I don't see that that is an issue that I have to decide in this case.

Mr. Updike: One of the issues you have got to decide is whether it was Mr. Kirby's duty as long as he had that document in the file and it was material before the referee to produce it, sir.

The Court: What is the issue that this is material to?

Mr. Updike: To the issue as tendered by Mr. Young before the referee that Young and Kirby could have gone out and bought the stock for less than $8.15 a share.

* * * * * * *

[fol. 973] Q. Mr. Purcell, you testified that you told the referee that the profits with respect to the real estate transactions were to some extent non-recurring profits, at least as no one could foresee at the time. Am I correct about that?

A. I think that is substantially correct.

Q. Did you, however, tell the referee that there were in existence five-year projections starting with the year 1950 which told what the management of IDS believed would be the income of IDS for a period of five years, starting with 1950 and going beyond it?

Mr. Whittlesey: Object to it as argumentative and improper.

The Court: Let us ask Mr. Purcell first. Were you asked for these?

The Witness: No.

The Court: Were you asked that question?

The Witness: No.

The Court: Did you volunteer anything on that?

The Witness: No, I don't think I did. My testimony would have to speak for itself, your Honor, but I don't [fol. 974] think so.

Q. Mr. Purcell, you were asked for projections, were you not?

Mr. Kissam: At what page?

The Court: Where is Mr. Purcell's testimony to that effect? What page are you referring to?

Mr. Updike: I am referring to the demand made generally by Mr. Pomerantz and Mr. Haudek.

The Court: Is it in Mr. Purcell's testimony?

Mr. Updike: I just asked him for his recollection.

The Court: You asked if he was asked something. Now what page is it on?

Mr. Updike: Is what on?

The Court: Whether he was asked or not?

Mr. Updike: I am just asking if that is his recollection.

The Court: All right.

A. I would suppose that the subpoena asked me to produce it, because it asked me to produce everything I had. I do not believe I was asked when I was on the witness stand to produce any projections that I could have produced and did not produce, if that is what you are asking.

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[fol. 975] Recross examination.

By Mr. Whittlesey:

Q. Mr. Purcell, in the light of—

Mr. Whittlesey: First, in the light of Mr. Purcell's letter of 1950, which was received in evidence as Plaintiff's Exhibit 350 and deals with the open market purchases by Mr. Purcell of IDS stock at this time, I would like to offer Defendants' Exhibit 320 for identification, which was Exhibit 422 before the referee in Zenn, dealing specifically with Mr. Purcell's open market purchases of IDS stock in 1949 and 1950.

The Court: Let me look at it. What is the significance of that?

[fol. 976] Mr. Whittlesey: Well, one for completeness, and second, in Mr. Purcell's letter of May 9, 1950, he states that his purchases caused the market to increase from five to above ten. The exhibit which your Honor has now shows exactly what his purchases were at the time in question and—

The Court: It shows that Mr. Purcell was not telling the truth; is that what you are saying?

Mr. Whittlesey: He was mistaken in this letter in what the actual fact was, which I think is more important.

The Court: If you want it I will take it in evidence.

Mr. Whittlesey: And also because that was before the referee.

(Defendant Kirby's Exhibit K-320 received.)

The Court: Anything else?

Mr. Whittlesey: Except to call to your Honor's attention that in Mr. Purcell's testimony before the referee, which is now in evidence, specifically at page 3994, this whole question of costs of open market purchases of the IDS Class A was testified to before the referee in connection with his decision.

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[fol. 977] CHARLES SHIPMAN, resumed.

Direct examination.

By Mr. Updike (Continued):

* * * * * * *

Q. Now, Mr. Shipman, just before we interrupted your testimony to take Mr. Purcell's examination, you identified [fol. 978] Plaintiff's Exhibit 220 for identification as being the Froggatt report that was referred to in your memorandum, which is 331 in evidence.

Do you recall that, sir?

Mr. Whittlesey: I do not know that that is quite what he said.

The Court: Well, ask him the question if there is any question about it.

Mr. Whittlesey: I do not like something to be characterized.

The Court: Ask him the question again, Mr. Updike, if there is any question about it.

Mr. Updike: Yes, sir.

Q. Do you recall seeing this document and referring to the brown covers on it or some such reference?

The Court: He identified receiving it.

A. Yes, sir.

Mr. Updike: I offer it in evidence, sir.

The Court: What proof is there that Mr. Kirby had this?

Mr. Updike: We now have the testimony that Mr. Baugeard recognized his memorandum of August 5, which is [fol. 979] the first page of Exhibit 331. We have this witness identifying his memorandum to Mr. Kirby of August 5.

The Court: Let's ask the witness, did he send this to Mr. Kirby?

That is all I wanted to know. You ask him the question.

Mr. Updike: Yes, sir.

The Court: Did you send that Froggatt report to Mr. Kirby?

The Witness: Yes, sir.

The Court: You did. All right. Well, I will receive it in evidence.

Let me have that.

Mr. Whittlesey: I would like to call to your attention, your Honor, that Exhibit 331, Mr. Baugeard's memorandum, also states—Mr. Baugeard so testified—that this report was returned to the Alleghany files.

The Court: All right.

Mr. Whittlesey: I do not see how—

The Court: It is received in evidence. At least Mr. Kirby saw it.

Mr. Whittlesey: There is no proof that Mr. Kirby saw [fol. 980] it.

The Court: At least it was sent to him.

(Plaintiff's Exhibit 220 received.)

The Court: All right, what's next?

Mr. Whittlesey: Mr. Kirby, I recall, testified he did not recall seeing it and it did go back to Alleghany.

The Court: I know.

By Mr. Updike:

Q. Now, Mr. Shipman, in connection with your work out in Minneapolis with the IDS people on behalf of Alleghany, as you testified earlier, did you have occasion to work with projections of future income there?

A. Well, I am not sure that I understand the question, did I work with projections. I studied the projection.

Q. Yes. All right, sir.

I show you a monthly projection for the year 1949, Plaintiff's Exhibit 244 in evidence, and ask you if that was one of the documents that you studied in connection with your work at IDS?

A. I would say yes.

Q. All right. I show you Plaintiff's Exhibit 246 for [fol. 981] identification and ask you if you can make the same statement about that?

A. Yes, sir.

Q. I show you Plaintiff's Exhibits 243 in evidence and 245 for identification, which purport to be five-year projections, respectively beginning with the year 1949 and the year 1950, and ask you if you can identify those as having been the subject of your study?

A. Yes, sir.

Q. Finally, I show you Plaintiff's Exhibit 348 in evidence, which is a so-called summary of operation statement for the 12 months ending December 31, 1949, and ask you if you worked with that, not with that particular statement, but with statements of which that is an illustration?

A. Yes, sir.

Q. Now, did you hear Mr. Purcell's estimony to the effect that IDS was a, I think he said, prolific producer of reports?

A. Yes, I endorse everything Mr. Purcell said on that. It was a very prolific producer of reports.

Q. When you were doing this work, I believe you testified that your office was in the Chrysler Building in New [fol. 982] York. Do you remember that?

A. Yes, sir.

Q. When you were through working were these reports, what did you do with them, sir?

A. I put them in my files.

Q. Do you have any present recollection of what was done with the Froggatt report that you identified a moment ago, which is now Plaintiff's Exhibit 220 in evidence?

A. No, sir, I do not.

Q. Judging by your practice, was it your practice to put these reports, when you were through with them, in any particular place?

Mr. Whittlesey: I object to this.

The Court: Objection overruled.

A. With respect to the Froggatt report, it is conceivable—I am not a hundred per cent sure—it is conceivable that Mr. Crabb wanted me to send it back to him and I may have sent it back to him. However, as a general rule my practice was to put all of this material in my files, and I had files of my own in addition to the regular Alleghany files, although they were, of course, kept in the Alleghany file room.

[fol. 983] The Court: We have reached the time for luncheon recess, so we will stand adjourned until 2.15.

(Recess to 2.15 p.m.)

[fol. 984] Afternoon Session

2:15 P.M.

CHARLES SHIPMAN resumed.

Direct examination.

By Mr. Updike (Continued):

Q. Mr. Shipman, when we recessed for lunch I was asking you about your procedure with regard to the disposition of files, including internal reports received from IDS in your offices at Alleghany in New York. Do you remember that, sir?

A. Yes.

Q. It is my recollection that you testified that they were put in files convenient to your location?

A. Yes, sir.

Q. Now, did that practice continue, sir, until December, 1952, when as I believe you told us you left Alleghany's direct employ?

A. Yes, sir.

Q. In connection with your departure from Alleghany, did you recognize those files or make some disposition of some of them, sir?

A. Yes, I did.

Q. Would you tell us just what you did?

A. Even while I was with Alleghany, I had from time to time thrown out reports, particularly the monthly state-
[fol. 985] ments because they were so voluminous. When I left, I threw out a good deal more.

Q. At least I would like you to tell his Honor the ones you did not throw out. Can you give us those in categories of importance, sir?

A. I am afraid I cannot. I don't recall, obviously. Those that I thought would be of permanent value, I left, and some I destroyed even though they might conceivably have had value, but it was unlikely, and in view of the space requirements, I threw out a good deal.

Q. Specifically did you regard the five-year projections as having permanent value, sir?

A. Yes, of course.

The Court: Did you throw those out?

The Witness: I doubt it.

Q. Did you keep any of the year by year projections by months so far as you can recall?

A. Some of these reports I took with me in connection with my own company, Coordinated Financial Services, because we continued to do work for IDS on a fee basis after I left Alleghany.

Q. Do I understand you did work on a fee basis for IDS itself?

[fol. 986] A. For IDS as well as for Alleghany.

Q. Did I understand you correctly this morning to say you also did consulting work or some such work for Alleghany Corporation?

A. Yes, sir, I did.

Q. Coming back to the projections by month for particular years, did you regard those as having permanent value with respect to your program of discard?

A. Yes, sir.

Q. Could you tell his Honor when you were through with this process how many file drawers, if there was more than one, was the space that was occupied by the part you did not throw out?

A. There could have been about six drawers.

Q. Containing material that you thought had permanent value?

A. I wouldn't want to be held to that.

Q. I understand that. That would be your best present estimate or recollection?

A. Yes.

Q. Can you tell his Honor, please, what other categories in your view were of sufficient permanent importance that you retained them?

[fol. 987] Mr. Whittlesey: He just testified he did not recall.

The Court: He is not asking you, Mr. Whittlesey.

A. I am going to have to say that I cannot recall. It is a long time ago, and these reports were very numerous and some even important ones had very similar names one to the other. For instance, as has already been mentioned here, there was the monthly summary of operations, then there was I think a comment on operations, and there was something of operations, so that I cannot recall precisely. Obviously, the annual reports, and by that I mean not the annual reports to stockholders but the 12 months through December of a given year—

[fol. 988] Q. May I show you Plaintiff's Exhibit 348 and ask you if that is an illustration?

The Court: Are you through, Mr. Shipman, on that answer? Are you finished with that answer?

The Witness: Well, I was going to say that there were certain mortgage reports, too, which related to forward commitments which I felt had permanent value, and some other things, but I cannot recall the specific items now.

The Court: What is this question, Mr. Updike?

Q. I show you Plaintiff's Exhibit 348 in evidence and ask you if that is one of the reports covering a period of 12 months which you regarded as having permanent value?

A. Yes, I would say so.

• • • • • • •

[fol. 989] Q. Thank you, sir. Now I show you Plaintiff's Exhibits 336, 335 and 257, and I ask you whether you recognize the first and the last of those three as letters from you to Mr. Waag and the remaining one is the letter from Mr. Waag to you?

A. Yes, sir.

Q. Now, looking at Plaintiff's Exhibit 257 and with particular reference to the column on the right, which is a series of checkmarks headed by the name Mr. Kirby, I show you the following documents from Mr. Kirby's file, and ask you if you can identify these documents against a particular checkmark in the letter that you hold in your hand?

A. Yes, that one, yes.

Q. That is, Plaintiff's Exhibit 348 corresponds to a checkmark in the column for Mr. Kirby, am I right about that?

[fol. 990] A. Yes, sir.

Q. I now show you Plaintiff's Exhibit 342 for identification from Mr. Kirby's file. Does that correspond to a checkmark appearing in the exhibit?

A. Yes, sir.

Q. Can you give us the number of that one?

A. 6.

Q. I believe you identified—

A. The other one was number 2.

Q. Corresponding to Plaintiff's Exhibit 348?

A. Yes.

Q. I show you Plaintiff's Exhibit 347 for identification, and ask you if you can find that in your checkoff list and give us the number for the record.

A. Yes, sir, number 8.

Q. I show you still another exhibit from Mr. Kirby's file being Plaintiff's Exhibit 340 for identification, and ask you if you can identify that from your checklist?

A. I am a little puzzled because it has a different caption, but it looks as though it did refer to an item that is numbered 2 on the ISC, but—

Q. May I draw your attention, sir, to the spread sheet [fol. 991] and see if that will refresh your recollection.

A. Yes, this usually is stapled in front, was stapled in front and it threw me for a moment.

Q. Can you identify Plaintiff's Exhibit 340 for identification on your checklist?

A. Yes.

Q. Finally, I show you from Mr. Kirby's file Plaintiff's Exhibit 339 for identification and I ask you if that corresponds to an item on your checklist under the name of Mr. Kirby?

A. Yes, I believe it is number 2 under ISA.

Q. Following your making of the request of Mr. Waag in Plaintiff's Exhibit 257, did you receive any complaint or word from either Mr. Kirby or Mr. Baugeard that the reports referred to therein were not being sent to them?

Mr. Whittlesey: I object to that.

The Court: Overruled.

A. No, sir, I received no complaint. On the contrary, I believe that I heard from Mr. Baugeard, I asked, "Are you receiving them now," and was told "Yes."

Q. In the course of your work at Alleghany in the period following the acquisition, did you occasionally or from

[fol. 992] time to time talk with Mr. Kirby with respect to IDS affairs and how they were going on and so on?

Mr. Whittlesey: May I hear the question again?

The Court: I think you heard it.

Mr. Whittlesey: Just the time.

Mr. Updike: In the period following the acquisition.

A. Following the acquisition, I talked very little with Mr. Kirby. I did, I believe, talk with him occasionally over the telephone or when he came into the Alleghany office for a board meeting or something. I talked very little with Mr. Kirby. I had relatively little contact with Mr. Kirby.

Q. Did you talk from time to time with Mr. Baugeard about these affairs?

A. Yes.

Q. Without being specific about it, as fellow analysts and statisticians did you from time to time discuss the contents of these reports that you were receiving?

Mr. Whittlesey: It seems to me his discussions with Mr. Baugeard are totally irrelevant.

[fol. 993] The Court: If you are objecting, it is overruled.

A. What was that?

Q. Did you from time to time discuss with Mr. Baugeard the contents of these reports that you both were receiving?

A. I would say undoubtedly yes, but infrequently and not at length.

Q. In the period from the beginning of your employment by Alleghany to, let us say, May of 1950, if you can approximate a span of, let us say, a year and six months or a year and eight months, did you go to Morristown to see Mr. Kirby himself on more than one occasion, because I believe you testified to one this morning.

A. I believe I went on more than one occasion, yes.

Q. In addition to IDS and its affairs, there were other subject matters that would bring you to Morristown to see Mr. Kirby, am I right about that?

A. Rarely. It did happen, but it was rare.

Mr. Updike: If the Court please, for the purpose of putting in the record the reports that did go to Mr. Kirby as the witness testified, I offer Plaintiff's Exhibits [fol. 994] 339, 340, 347, 342.

Mr. Whittlesey: Your Honor, in the absence of any showing that any of these documents were in fact in Mr. Kirby's file at the time of the hearings, I object to their receipt in evidence on the issue before the Court here, which was Mr. Kirby's failure to adduce facts at that time. I would also point out, your Honor, that in the case of some of these exhibits—Exhibit 339 for identification is a good example, there is no date whatsoever on the exhibit to show when it came into existence, let alone when it got to Mr. Kirby, if it ever did. In other words, I would say there is no connection established between these pieces of paper and Mr. Kirby.

The Court: Let me see the letter that the witness had.

Mr. Updike: I wish to make one thing clear, and we do not claim that the documents before your Honor were among those that Mr. Kirby failed to adduce. That is confined to Exhibit 348 for identification. There is a similar statement on 348 with respect to Investors Syndicate of America which also contains projections.

The Court: What I am trying to find out is did Mr Kirby have them and then do you claim that he failed [fol. 995] to produce them?

Mr. Updike: That is only with respect to one of the documents that you have before you.

The Court: Which document?

Mr. Updike: I will identify it in a moment. Plaintiff's Exhibit 339 for identification, which also contains projections, sir.

Mr. Whittlesey: That I point out to your Honor is an undated document. There is nothing on it to indicate when it came into existence.

The Court: Let us ask the witness. Do you know whether this was ever sent to Mr. Kirby?

The Witness: I cannot state whether a particular document was sent to Mr. Kirby, because they were sent direct from Minneapolis.

The Court: Certainly monthly reports, according to Exhibit 257, were asked to be sent to Mr. Kirby. Whether this one was sent is the question, I guess. What proof is there that Mr. Kirby actually received this?

Mr. Updike: There is no proof that he received it. There is proof before your Honor that under the procedure that this witness was requested to adopt by Mr. Young, documents were asked for by Mr. Kirby which are represented [fol. 996] by those checkmarks in the margin of Exhibit 257. The witness has testified that he knew—I believe he said he knew from talks with Mr. Baugeard that they did end up in Mr. Kirby's file.

Mr. Whittlesey: No, he said he heard no—

Mr. Updike: These particular ones are all from Mr. Kirby's file.

Mr. Whittlesey: Exhibits 339 and 340, we got them out there on those depositions.

The Court: 339, where did that come from?

Mr. Whittlesey: I beg your pardon.

Mr. Updike: All of these documents were produced by Mr. Whittlesey from Mr. Kirby's own files.

The Court: Exhibit 339 came from Mr. Kirby's file?

Mr. Updike: Yes, sir.

Mr. Whittlesey: It is still an undated document.

The Court: Yes, that relates to transactions for the month of December, 1949. It is pretty easy to know approximately when it must have been received. It certainly must have been received before the hearing before the referee. I will receive that.

[fol. 997] (Plaintiff's Exhibit 339 for identification received in evidence.)

The Court: How about these others?

Mr. Updike: It was part of my proof with respect to the course of conduct under Exhibit 2.

The Court: Exhibit 339 was a document that Mr. Kirby had and should have presented before the referee and did not do so?

Mr. Updike: Yes.

The Court: The rest you don't need in evidence.

Mr. Updike: I don't believe I do.

The Court: What particularly was relevant before the referee in this document?

Mr. Updike: Only the demand for projections, sir, documents containing projections.

The Court: Where are the projections?

Mr. Updike: They are in the spread sheets, sir.

The Court: It may be undated, but it has figures for November and December, 1949.

Mr. Whittlesey: The question is what he knew at the time of the transaction and that would depend on when this thing came into existence.

[fol. 998] The Court: That is a matter for your argument. What interests me here is that this projection for the month of December, 1949—what difference does it make? What is the point of saying that this particular document should have been introduced before the referee?

Mr. Updike: It is to bring home to Mr. Kirby knowledge, as we say—

The Court: What is brought home from this one? I am asking one question and you start out on another. I cannot follow you. What particularly on this exhibit is relevant? Let us talk to this exhibit and not something else.

Mr. Updike: That exhibit shows the way in which that corporation's affairs were handled month by month, there was a projection with respect to what its performance was going to be, on the testimony of Mr. Purcell, that monthly projection there that appears before your Honor in that exhibit was part of a yearly projection that was done month by month in the forepart of the year, and this was notice to Mr. Kirby that that is how the business was conducted.

The Court: I think that is obvious. He knew there were projections. He knew those were projections made on a [fol. 999] yearly basis and he got the statements showing how it compared with the projection.

Of what particular significance did it have as far as the referee was concerned?

Mr. Updike: It was because, sir, the record shows that before the referee the plaintiff's attorneys repeatedly asked for forecasts and projections and none of them were marked in evidence.

The Court: Where did you repeatedly ask for forecasts and projections?

Mr. Updike: Starting at page 1943, the questioning by Mr. Graubard.

The Court: Is that in evidence?

Mr. Updike: Yes, in this green bound volume.

The Court: Exhibit 399, portions of the Zenn v. Anzalone record.

Mr. Updike: Yes.

The Court: What page are you looking at?

Mr. Updike: 1943.

The Court: What did you refer to?

Mr. Updike: Look at the bottom third of the page. Mr. Graubard is questioning, and he says: "Page 92, line 5: 'Would there be, for instance, in this budget also a fore-[fol. 1000] cast of mortgage operations and their results?

"'A. There very likely would.

"'I would ask you to have a check made for the existence of any such budgets or forecasts or projections of earnings in any form whatever, in the form of a memorandum or in the form of a financial statement or a report, and I would surely appreciate your furnishing those.

"'A. Gladly.

"'Q. I am referring most particularly to those covering the years 1949, 1950, 1953, 1954.

"'A. Surely.

"'Mr. Daly: With reference to IDS, of course?

"'Mr. Haudek: Always IDS.

"'Mr. Daly: If they are available, we will produce them.'"

This is Mr. Graubard continuing to read from the interrogation by Mr. Haudek.

"'My request will include any kind of forecast both as to the nature of earnings for mortgage operations as well as any other aspects of the business of IDS.

"'A. Naturally.'"

The Court: Now, what did they provide?

[fol. 1001] Turn to page 3060. Mr. Daly says:

"*As Mr. Wallace stated* some time ago, he was attempting to get from IDS monthly statement from IDS for the period November 30, 1949, through May 31, 1950. Those statements came in today. I will now offer the statements for each of these months."

Apparently they asked for them and Mr. Daly got them and he offered them. What is the point?

Mr. Updike: This was testified to by Mr. Purcell this morning, the documents that were produced and marked at the point that your Honor just read from were marked Exhibits 397-B, C, D and so on before the referee. That, your Honor, contains no projections for the future at all, whereas Exhibit B, which is annexed to Plaintiff's Exhibit 348, shows—

The Court: Let us keep on Exhibit 339. That is the exhibit I am passing on. That has projections.

Mr. Updike: That has projections which would have been notice to Mr. Graubard of what it was that the ISA people expected to produce, expected to perform early in that year, and this measures their actual performance against their projection.

[fol. 1002] The Court: And you say that is the significance of this particular document?

Mr. Updike: Yes, sir.

The Court: I receive 339 in evidence.

(Plaintiff's Exhibit 339 received.)

The Court: All right, what is next?

By Mr. Updike:

Q. Mr. Shipman, did anybody ask you to be a witness in connection with Zenn against Anzalone, the litigation known as Zenn against Anzalone?

A. No, sir.

Mr. Updike: That is all.

The Court: All right, Mr. Whittlesey.

Cross examination.

By Mr. Whittlesey:

Q. Mr. Shipman, in 1955 and 1956 did you have an office in New York City?

A. Yes, sir.

Q. And you had a business here?

A. Yes, sir.

Q. What was the name of that business?

A. Coordinated Financial Services. We changed the name—I don't remember what year—we changed the name to Coordinated Services.

Q. Now I show you Exhibit 348 in evidence, which is [fol. 1003] the IDS summary of operations statement for the year ending December 31, 1949, and I call your attention specifically to Exhibit C thereof, which is entitled Net Income from Investments, Management, Mortgage Operations and Certificate Servicing, and particularly to the column under the general heading 12 months ending December, the right-hand column headed 1949, and I would ask you whether that does not purport to show the actual results for the company as of the end of 1949?

A. Yes, sir, it does.

Q. And the column next to the left of that, headed Projected 1949 refers, does it not, to the results which had been projected for 1949?

A. Yes, sir.

Q. In other words, that refers to a past projection?

A. Yes, sir.

Q. Presumably made either early in 1949 or at the very end of 1948?

A. Yes, sir.

Q. In other words, the summary of operations statements do not contain any forward projections of future anticipated results, correct?

[fol. 1004] A. Not beyond the year.

Q. No, they stay right within the year, and they are a past recording of previously made projections?

A. For the year; yes, sir.

Q. Or if it was a cumulative report for the first six months it would contain a past recording of projections for that six months?

A. Yes, sir.

Q. Now, referring to Plaintiff's Exhibit 257, this letter which you sent to Mr. Waag on September 16, 1949, requesting that certain reports be sent, and you checked off some for Mr. Young and some for Mr. Kirby, you requested that all of those reports be sent to you at Alleghany, right?

A. Not those that were going to Mr. Kirby, no, sir. They went direct to Mr. Kirby.

Q. I am not talking about those. I will phrase the question a little differently.

Looking at this letter does it request that the reports listed in the letter be sent, all of them, to you at Alleghany?

The Court: Copies of those reports.

The Witness: Copies, yes.

[fol. 1005] Q. Copies, exactly.

A. Copies, yes, sir.

Q. And they were received by you at Alleghany?

A. Yes, sir.

Q. And were placed in the Alleghany files by you?

A. Well, in my files at Alleghany.

Q. In your files.

A. And they were in the Alleghany file room.

Q. And later on, if I follow your testimony to the extent that you considered some of those cumulative and of no permanent significance, you would weed them out of the files.

A. Well, we just did not have room for them all.

Q. I believe you testified that you think that you visited Mr. Kirby in Morristown some time after that visit which you made on December 20, 1948.

A. Yes, sir.

Q. Do you have any specific recollection of any such visit?

A. Well, I do not have a specific recollection of the conversations and discussions, but I do have a recollection of visiting him again.

Q. I believe you also testified that you recalled that you [fol. 1006] had had some discussions at some time with Mr. Baugeard with regard to IDS.

Can you tell me of any specific discussion that you recall?

A. No, sir, I cannot, but I am quite sure that from time to time I did talk to Mr. Baugeard, reviewing questions of the operations and outlook as they were shaping up for IDS.

Mr. Whittlesey: Now, your Honor, in connection with these Rossetter reports with respect to which Mr. Updike asked Mr. Shipman some questions, I would just like to direct your Honor's attention to Mr. Graubard's testimony at page 405 and 406 of the record here in which he stated that he was familiar with those reports.

Specifically, he testified:

> "That name is familiar to me because I saw some documents concerning Rossetter I could not now tell you whether or not concerning McDonald—I could not now tell you whether my familiarity with the name stems from my original research or from having seen the documents again recently. In regard to Rossetter, I have a clear recollection."

[fol. 1007] Q. Now, Mr. Shipman, I show you Plaintiff's Exhibit 245, being a projection from IDS's general accounting department covering the years 1950 through 1954, and I call your attention to the fact that there is no date on any of those sheets.

The Court: And what question are you asking?

Q. And I will ask you, Mr. Shipman—I believe you have testified that you believe you saw that projection, right?

A. Oh, yes. I do not know if I testified, but I certainly did see it.

Q. I think you did.

Now, can you recall when you saw it?

A. No, sir, I cannot.

Q. And I believe you have told us that in 1950 and subsequent years you made visits out to IDS, right?

A. Yes, sir.

Q. And looked over reports there?

A. Yes, sir.

Q. Do you recall whether you saw that at IDS or at Alleghany?

A. Oh, I had this at Alleghany.

[fol. 1008] Q. You had that at Alleghany?

A. Yes.

Q. You do not know when you received it, do you?

A. Not specifically.

Q. By "Not specifically," what do you mean?

A. I mean that it could have been during—it could have been in the middle of 1949. It might be later than that.

Q. The projection for 1950 in the middle of 1949?

A. Yes. It might have been the end of 1949.

Q. Up to when?

A. Oh, I don't think it was later than 1949.

Q. You mean the 1949 projection?

A. I believe so.

Q. You saw this first in 1949?

A. I believe so.

Q. Mr. Shipman, you testified earlier this morning that before Alleghany's acquisition of IDS you made a certain amount of investigation of IDS.

A. Yes, sir.

Q. And you saw various people, some out in Minneapolis, [fol. 1009] and you went to Kidder Peabody, I believe, amongst others, and you wrote various reports after that?

A. Yes, sir.

Q. And these reports that you prepared were based on the information that you obtained in that way, is that right?

A. Yes, sir.

Q. Would it be correct to say that the information that you obtained was information which should be publicly available to anyone? I am referring to prior to the acquisition.

A. Well, some information I got from Mr. Gamble. I think it would be stretching a point to say it was publicly available to anyone.

Q. What information can you think of now in any of those reports that was not publicly available?

A. Oh, I can't recall. What I would say, I feel that your question justifies a better answer than I have given, and I will try to do that. The information that I was able to obtain at first was very, very slight and very, very sketchy, that is, the information that was in the published [fol. 1010] manuals, and I supplemented that by going to Kidder Peabody, and I went down to the SEC files in Washington. Of course, what was in the SEC files was publicly available. Also information I got in Minneapolis, some of it was publicly available to someone who would present himself as an investor and ask for the information that way. That was publicly available.

On the other hand, I would say that some of the information from Mr. Gamble and some of the information from Kidder Peabody, I would say that it would not be called publicly available.

Q. Perhaps I might put it in a somewhat different way, that anyone making the same type of inquiry that you were making, posing as someone who is interested in investing in IDS or buying certificates of mutual funds, could likewise have obtained it?

Mr. Updike: I object to the form of the question put.

The Court: I think, Mr. Whittlesey, the answer is obvious. I mean, have you ever tried to go to Kidder Peabody and get some information? Try and do it some time. It [fol. 1011] will be an education for you.

A. I have to say that I had some good friends—I had a very good friend there who happened to be close to that situation. I suppose that someone else—I am sure that someone else could get the information, too.

The Court: If they had the right introductions.

The Witness: Yes.

Q. And do you recall what information you got from Kidder Peabody?

A. No, I don't recall at the moment.

The Court: When you talked to Mr. Gamble did you have an introduction to him?

The Witness: Yes, I did.

The Court: He knew you came from Alleghany Corporation?

The Witness: Mr. Gamble did.

The Court: That is quite different from a member of the public.

What difference does it make? You are belaboring this point. I do not know where you are going.

Mr. Whittlesey: I will tie this one up very quickly, your [fol. 1012] Honor.

Q. Now, you wrote a series of reports, didn't you, one on December 18, 1948?

A. Yes, sir.

Q. Another on December 31, 1948?

A. Yes, sir.

Q. Another one on January 4, 1949?

A. I believe so.

Q. You identified that on your deposition.

A. I don't recall the date at the moment.

Q. And finally you wrote a report on April 7, 1949, do you recall that? I will show you—

A. Oh, yes, I remember that very well.

Q. Would it be correct to characterize that report as your final report?

A. I would say so.

Mr. Whittlesey: I would like to offer that in evidence, your Honor. It is Defendant's 294 for identification. It was offered in the hearings before the referee as Exhibit 393.

The Court: Let me look at it.

What is particularly significant about it, Mr. Whittlesey?

Mr. Whittlesey: It is significant on this issue of what [fol. 1013] Mr. Kirby did or did not adduce. I think that was listed as one of the particular items which he did not adduce, but the information shows what was adduced before the referee with regard to the financial condition of IDS, and the charge here is that Mr. Kirby had not adduced facts in that regard. As I see it, actually, your Honor, the only way we can really test the extent to which Mr. Kirby may or may not have come up to that duty, if such existed, is by looking at the entire Zenn record, anyway. This happens to be one of the more significant items which was before the referee in the Zenn hearings.

The Court: Does it show the projections? I do not think it does.

Mr. Whittlesey: That shows projected income—

The Court: On page 13 it has the projection.

Mr. Whittlesey: —on file with the SEC.

Yes, exactly, your Honor.

The Court: It shows the projection of earnings from 1947 through 1956.

Mr. Whittlesey: That's correct.

The Court: All right, I will receive it in evidence.

[fol. 1014] Mr. Updike: If the Court please, I do not object to the offer. What we did claim was not adduced was that there was a supplement to this which consisted of two

pages. It referred to this witness' inquiry into the actuarial firm of Froggatt & Company that your Honor has already admitted in evidence. That is the part that was not before the referee.

The Court: All right.

(Defendant Kirby's Exhibit K-294 received.)

The Court: What's next, Mr. Whittlesey?

Mr. Whittlesey: Will you concede, Mr. Updike, that that supplement which was dated April 12, 1949, was found by you in the Alleghany files and so indicated in Plaintiff's response to our interrogatories?

Mr. Updike: Yes, sir, if you will concede that it was also in Mr. Kirby's files.

Mr. Whittlesey: Certainly.

By Mr. Whittlesey:

Q. Mr. Shipman, after Alleghany acquired IDS, I believe you testified you went out to IDS and made a much more careful and intimate study based on its internal rec- [fol. 1015] ords and discussions with its officers and so on and so forth, right?

A. Yes, sir.

Q. And did that eventuate in your preparing another report?

I show you this document bearing date of August 15, 1949, and ask you if that refreshes your recollection?

A. Well, I did prepare this report; yes, sir.

Q. And furnish copies to Mr. Young and Mr. Kirby, didn't you?

A. Yes, sir.

Q. Also to Mr. Purcell?

A. I believe so.

Q. And filed a copy in your files at Alleghany?

A. Yes, sir.

Mr. Whittlesey: I would like to offer this report, your Honor, which Defendant's K-295 for identification, with the

observation that this also was in evidence before the referee in Zenn as Exhibit 394-A, and likewise contains projections as to the future income of IDS.

The Court: This was made in 1949, apparently, Mr. Shipman.

[fol. 1016] The Witness: In August, I believe.

The Court: August.

All right, received in evidence.

(Defendant Kirby's Exhibit K-295 received.)

The Court: Anything more, Mr. Whittlesey?

Mr. Whittlesey: Now, your Honor, you will recall that yesterday Mr. Updike offered in evidence certain selections from the testimony before the referee, and I asked you at that time if after looking over that we might put in what we feel to be necessary to supplement those particular portions which he offered.

The Court: Yes. His offer was Exhibit 399, portions of Zenn-Anzalone.

Mr. Whittlesey: That's right, and I would like to offer supplementary references from the transcript in the same area which has been marked as Defendant's K-355 for identification.

The Court: I will receive it in evidence. You had better point out to me what I am supposed to look at in there, though.

Mr. Whittlesey: I will do that, your Honor.

The Court: Some of it may escape me unless I have it [fol. 1017] particularly pointed out to me.

Mr. Whittlesey: I have been very careful not to duplicate Mr. Updike.

Mr. Updike: May I make an observation on the record, sir? I think it was early this week your Honor said, "Has the Zenn transcript been marked in evidence in this case," and my answer was no. In view of the arguments and cross arguments with respect to what the Zenn record shows, I would like to offer the entire Zenn record, but for the exclusive purpose of using it as the basic source of

what actually not only was put into evidence, which is comparatively simple to identify, but that which was tendered to counsel or identified by witnesses on the witness stand with the understanding that we will furnish the specific supporting pages that we decided to call your Honor's attention to.

Mr. Updike: Your Honor—

The Court: I let you put the portion in which you thought was important, Mr. Updike, which is Exhibit 399.

Now, I have allowed Mr. Whittlesey to put in the portion which he thinks is important, which is Exhibit K-355. Now, why do I have to take the whole balance of the deposi-
[fol. 1018] tion? You two fellows between you know what it is you think is important and it is all received in evidence. Now, a lot of things may be in in addition to that. Why do I have to take that in evidence?

Mr. Updike: I do not believe it is necessary to burden your Honor. I would like, in view of the disputes that have arisen because of lack of clarity, I would like to have an opportunity to supplement Exhibit 399.

The Court: All right, that I will be glad to do.

(Defendant's Kirby's Exhibit K-355 received.)

Mr. Whittlesey: I would like to offer in evidence Defendant's Exhibit 354 for identification, which also was an exhibit in the Zenn hearings, there numbered 400. I am offering it simply for the purpose of showing there is listed all of the various reports of IDS and ISA which appear on this list, Plaintiff's Exhibit 257 in evidence, for the purpose of showing that the existence of such reports was made clear to the parties in the Zenn hearing.

[fol. 1019] The Court: All right, I will receive it in evidence.

(Defendant Kirby's Exhibit K-354 received.)

* * * * * * *

[fol. 1020] By Mr. Whittlesey:

Q. I show you Exhibit 339 for identification, this undated statement entitled "Net income" with schedules attached, [fol. 1021] and I believe that you testified that that was one of the reports which you in your letter of September 16, 1949, to Mr. Waag, Exhibit 257, requested be sent to Mr. Young, Mr. Kirby and yourself, right?

A. I believe so.

Q. So you received that report of Alleghany?

A. Yes, sir.

Q. And put it in the files?

A. Yes, sir.

Mr. Whittlesey: I have no further questions, your Honor.

The Court: No one else has any further question?

(Witness excused.)

Mr. Updike: Mr. Pomerantz, please.

Abraham L. Pomerantz, called as a witness, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Updike:

Q. Mr. Pomerantz, you are a member of the New York Bar?

A. I am.

Q. For how many years approximately have you been [fol. 1022] a member of the bar?

A. 39 years.

Q. You are a member of the firm of Pomerantz, Levy & Haudek?

A. To which I may say has been added Block.

Q. Directing your attention backward to the spring of 1954, were you at that time counsel for the plaintiff in an

action in the New York State Court entitled Zenn v. Anzalone?

A. I was appointed general counsel by order of the Supreme Court, New York County, and I have served in that capacity ever since.

Q. Were there a number of similiar actions that were consolidated for the purposes of that one action in which you were appointed general counsel?

A. That's right, sir.

Q. Was there a corresponding action in this court, United States District Court?

A. There was and is.

Q. Were you appointed general counsel in connection with that case as well?

A. I believe so, I am not quite as clear, it is a matter of record, but I am pretty sure I was in the Zenn federal case too.

[fol. 1023] Q. Following the commencement of those two actions, did there come a time when you noticed the examination of certain witnesses to have their depositions taken in the Federal Court action?

A. My recollection is that the depositions were jointly taken in both the Federal and the State Court actions which were pending concurrently.

Q. Was one of the served defendants in Zenn federal Mr. Allan P. Kirby?

A. I am pretty sure he was. There again it is a matter of record.

Q. In connection with your acting as general counsel for the plaintiff, as you have testified, were you associated at times with your partner Mr. Haudek?

A. Yes, Mr. Haudek and I, I would say, had the laboring oar of the prosecution of the cases both in this court and in the State Court.

Q. Mr. Pomerantz, I show you what has been marked here as Plaintiff's Exhibit 357 for identification, and was marked in the hearings of Zenn v. Anzalone in the State Court as Plaintiff's Exhibit 461, and ask you if you can

identify that as a demand emanating from your law firm in connection with the taking of depositions?

[fol. 1024] A. If I may qualify your question slightly, Mr. Updike, this was a demand which literally came out of and under the letterhead of our designated accountants, David Berdon & Co., but it is quite accurate, as you say, that this demand was the composite work of our accountants, Mr. Haudek and myself.

Q. And it did come with the authority of your law firm as representative of the plaintiffs in those actions?

A. That's right.

Mr. Updike: I offer it in evidence, if the Court please.

The Court: Any objection?

Mr. Whittlesey: No objection.

The Court: Received in evidence.

(Plaintiff's Exhibit 357 for identification received in evidence.)

The Court: You better fix the time for that, Mr. Updike, when it was served in all of these involved proceedings.

The Witness: Your Honor, the time of that is represented by a non-legible date which did appear on the right-hand corner of that document and probably still appears on the original of which that is a photostat. The date that did [fol. 1025] appear there, your Honor, may still be visible through a microscope is December 8th of 1954, therefore precedes considerably the hearing before Referee Fitzsimmons.

I might say, your Honor, that a reference to the date as the referee read it into the record of the hearing appears at page 4270 of the referee's transcript.

Q. Without wishing to slight any of the other elements of your demand as shown in Plaintiff's Exhibit 357 in evidence, I direct your attention specifically to paragraph 35 and ask you if you recall that as a portion of the total demand?

A. You refer to all forecasts or budgets concerning IDS?

Q. Yes, sir.

A. I recall that rather vividly, yes.

Q. Mr. Pomerantz, in the course of the depositions taken jointly as, I believe, you testified a moment ago were documents from time to time produced by counsel for the defendants?

A. Yes, great, great quantities.

Q. In the course of the production of those documents, were you and your associates given an opportunity to [fol. 1026] examine them?

A. Yes, we were and did.

Q. Did this happen on more than one occasion?

A. On several occasions. If I may add, by my associates I mean my partner Mr. Haudek, our accountant in charge, Mr. Klinger, and myself.

Q. It appears in evidence here, sir, that at page 1943 and page 1944 of the record before Referee Fitzsimmons in the Zenn case that Mr. Graubard had reference to some interrogation that Mr. Haudek had conducted in the course of the deposition. I ask you first of all, do you know Mr. Graubard?

A. I do indeed.

Q. What was his role in the hearings before the referee in the State Court?

A. Mr. Graubard took the position that the settlement which we had negotiated was inadequate and that the requested judicial approval should be denied.

Q. In that proceeding was he representing an objectant named Rosen?

A. Yes, I am quite clear that was his name.

Q. Do you recall independently that Mr. Graubard in the course of the interrogation of Mr. Wallace before the referee sought to have—

[fol. 1027] The Court: Mr. Updike, hadn't you better tie it together, how they got a referee? You are jumping. How was there a referee in the situation?

Q. Will you, if you can, recount for us just from recollection the steps through the point where the referee was appointed?

A. Yes, it is easy to recall because the procedure is identical in all of our derivative cases. Having secured a contract of settlement with the defendants, we thereupon put it before the Supreme Court, New York County, I believe Mr. Justice Owen McGivern, for approval of the adequacy of our settlement.

In accordance with the usual procedure in the State Court, almost invariable procedure, I would say, Mr. Justice McGivern designated a referee, Mr. Robert Fitzsimmons, for the purpose of taking proof, taking evidence as to the adequacy of the settlement, but only after notice of the proposed settlement had gone out to the entire body of the shareholders of Alleghany with an opportunity to appear before the referee and to show cause why the settlement should not be approved.

My recollection is, and this is again a matter of record, that Mr. Graubard and Mr. Phillips and the late Mr. Brussel appeared in opposition to the settlement even in [fol. 1028] advance of the return day of the notice, and were heard by the referee.

I believe that summarizes the procedures by which the reference was inaugurated and took place. I might say, just to complete the story, that very extended hearings were held before Mr. Fitzsimmons running over an awfully long period of time at which Mr. Graubard and his associates took the view and offered evidence in the hope of proving the inadequacy of the settlement. Ultimately, as your Honor may know, the settlement was approved by the referee and on motion to confirm the referee's report was approved by Mr. Justice McGivern. I think that is the thing in a nutshell.

The Court: Then in connection with the Federal Court proceeding, Mr. Graubard came in and asked that any settlement in the State Court could not be used as a settlement in the Federal Court.

The Witness: Yes, Judge Walsh had earlier than the period I have just recounted to your Honor entered an order, the practical effect of which was to stay the use of the settlement decree in the State Court when and if it should come down as a plea in bar in the Zenn Federal Court case, and that resulted in kind of an inter-court stale-
[fol. 1029] mate which presented a great many procedural problems.

The Court: How did Referee Fitzsimmons get appointed Special Master in the Federal Court?

The Witness: My recollection is that to prevent overlapping of work and multiplicity of procedure, one of the District Court Judges, whose name perhaps you can supply to me, appointed Mr. Fitzsimmons as master in connection with a new settlement renegotiated by Mr. Graubard and his associates.

When that was brought before the District Court for approval under Rule 23(b), I think it is, the District Court referred the matter or re-referred the matter to Mr. Fitzsimmons, and Mr. Fitzsimmons in due course approved that as a resettlement, as it were, of the initial settlement which I had made. Telescoping hundreds of procedures, that new settlement was approved in time by both courts, State and Federal.

Q. Was it Judge Dimock, perhaps?

A. Yes, I think it was Judge Dimock who did the appointing in the District Court.

* * * * * * *

[fol. 1030] Mr. Kissam: Excuse me, your Honor, I think Mr. Pomerantz stated inadvertently that the Federal Court approved the settlement. If your Honor is accepting that [fol. 1031] as history, I think we should call your attention to the fact that it is inaccurate.

The Court: My recollection of the docket entry is that there was no approval of the settlement in the Federal Court, but what the Federal Court did was lift the injunction to allow the settlement to go ahead in the State Court.

Mr. Kissam: We have Exhibit 20, an order of Judge Walsh appointing Mr. Fitzsimmons special master. I merely mention that—

The Court: There was no hearing under Rule 23(b).

The Witness: Thank you for the correction, Mr. Kissam.

* * * * * * * *

By Mr. Updike:

Q. Coming back to the hearings before the referee, those hearings extended over a period of several months, did [fol. 1032] they not?

A. I thought they ran on and off over a period of a year. If by those hearings you mean the hearings on the initial settlement and the hearings on the amended settlement, it would be my guess, my best guess, again it is a matter of record, that they ran on over a year, on and off.

Q. With interruptions to suit convenience from time to time during that period?

A. Yes. I did not mean to imply that they were by any means continuous over a period of, as I recall it, about 14 months. There were many more interruptions than there were actual sessions.

Q. Returning to the examination of records which you have told us were produced by defendants' counsel in connection with those hearings, I ask you, sir, first of all, whether the records as you recall were produced by Alleghany Corporation and, if so, through whom?

A. I cannot answer that question in those terms. I can say, if it will serve you, that huge quantities of records were piled up at the table of Lord, Day & Lord, and Mr. Haudek and I and, I believe, from time to time our accountant Mr. Klinger looked through these piles of documents. In point [fol. 1033] of time, I would place that largely in advance of the time that I commenced taking depositions of Mr. Robert Young and, I think, Mr. Wallace and whoever else.

I cannot tell you at this moment out of whose files those documents came.

Q. Regardless of whose files they came out of, they were in substantial quantity, I take it, from your testimony?

A. They were indeed.

Q. Did you and Mr. Haudek review them from the standpoint of relevancy and materiality to your cause?

A. We did very closely, sir.

Q. In the course of your examination of them and reminding you of your or the portion of your demand which related to projections, do you have any present recollection that there were produced for you in connection with that examination by you any so-called projections of the financial affairs of IDS for the relevant period, which would be 1949, 1950 up to, let us say, the middle of 1950?

A. If by projections you mean financial statements—I don't mean to fence with you—but I would just like to [fol. 1034] define terms. If you mean profit and loss statements, earnings statements for the period you have described, my best recollection is that we were shown no statements which contained estimates in futura. I underscore the last two words, because I am not referring to past estimates and their vindication by the passage of events. I take it you mean future statements.

Q. Yes, sir.

A. My recollection is that in terms of financial statements we received none such, although item 35, as you have pointed out, called for estimates and projections, relating now to the anticipated earnings of IDS, looking forward from the first few months of 1950.

Q. Specifically, sir, when I use the term "projection," I am referring to it as a series of figures in a financial statement as distinguished from what might be called a prediction or a forecast in, let us say, a letter report.

A. I think my answer is that I received no such forecasts or estimates, and I believe Mr. Graubard, picking up my request during the hearings before the referee, also asked [fol. 1035] for forecasts and estimates and again, I believe, that Mr. Wallace, David Wallace, testified that there were no such animals, and he produced none.

Q. With respect to the timetable involved, if I may, I will point out that it is in the record here that the date of the shareholders meeting of Alleghany that was called in part to consider the possible ratification of the transfer of shares from IDS, from Alleghany's portfolio, Class A shares of IDS from Alleghany's portfolio to Mr. Kirby and Mr. Young.

A. Mr. Purcell—

Q. No.

A. You go ahead, I am sorry I interrupted.

Q. And Mr. Anzalone.

A. Ignore my interruption, I am sorry.

Q. The fact of Mr. Purcell's ultimate participation was brought before the meeting, but Mr. Purcell was not a direct participant, as I understand the facts. That meeting was May 3, 1950.

A. The stockholders meeting?

Q. That is just to give you a time reference.

I show you what has been identified here, Plaintiff's Exhibit 245 for identification. It has been identified by [fol. 1036] Mr. Purcell and by Mr. Shipman, and purports to be a projection for a five-year period, starting with the year 1950, and I ask you, sir, if that was one of the documents that was exhibited to you? As you have testified, documents were tendered to you to be passed in review (handing to witness).

A. It would be useful if you could give me the date of the preparation of this document, incidentally.

Q. The date of the preparation of it, sir, does not appear on it. There is testimony with respect to that, but it has not been introduced yet. So I cannot give you a date, except that I think Mr. Whittlesey will agree it was some time in 1950.

Mr. Whittlesey: Some time in 1950, yes.

A. Thank you. I did not see this document.

Q. You are clear and firm in that recollection, are you, sir?

A. Just to corroborate my recollection, I take it this document was never offered in evidence before the referee?

Q. It was never offered in evidence before the referee. [fol. 1037] . A. That confirms my recollection that I never did see it.

Q. I show you Plaintiff's Exhibit 246 for identification, which does bear a date on its face in the lower righthand corner, April 14, 1950, which purports to be a projection by months for the entire year 1950 of the net income of IDS, and ask you if you ever saw that document in connection with your search through the documents that were tendered to you and your associates for examination?

A. I did not see that document.

Q. I show you, sir—

The Court: May I see them, please.

The Witness: The bottom one is the annual projection, sir (handing to Court).

Q. I show you, sir, Plaintiff's Exhibits 240, 241, 242 for identification, which are headed, respectively, summary of operations of Investors Diversified Services, Inc., for the month ending January 31, 1950, the month ending February 28, 1950, and the month ending March 31, 1950.

I ask you if you saw any of those in connection with the documents that were proffered to you and your asso- [fol. 1038] ciates for examination in connection with the hearings before the referee?

A. I would prefer to say, Mr. Updike, that the substance of the contents of the three exhibits you have identified were certainly known to me and made available to me in one or another form. That is to say, I was shown and knew the earnings of IDS for the months ending January and February and March 1950.

Now, whether these particular documents which you have handed me were the ones that I saw, I cannot be utterly positive about, unless you tell me they were marked in evidence before the referee.

[fol. 1039] Q. Mr. Pomerantz, I show you K Exhibit 180, K Exhibit 181, and K Exhibit 182, which correspond to the months of January, February and March of 1950, and I draw your attention to these as financial statements pertaining to IDS by months which were introduced before Referee Fitzsimmons.

The Court: What is your question?

Q. My question is, by reference over to Exhibits 240, 241 and 242, and particularly if you will refer to Exhibit B [fol. 1040] of each of those exhibits, can you tell us whether you saw them in connection with the papers that were—

A. Would you leave that here a moment? Would you be good enough to point out Exhibit B, if you will?

Q. Yes.

Mr. Kissam: Are these a Zenn exhibit, Mr. Updike?

Mr. Updike: There is no Zenn exhibit number on the present ones, but on the ones before the witness, they have been marked K-180 and the Zenn exhibit number does not appear on them.

Mr. Whittlesey: K exhibits were all Zenn exhibits.

* * * * * * * *

[fol. 1041] The Court: Well, we have almost reached adjournment time. I have a pretrial conference set for 4.30, some people who want to go to trial forthwith, like most litigants do, and I think we can stand adjourned until 10.30 tomorrow morning. That will give Mr. Pomerantz a chance to go over these things.

* * * * * * * *

[fol. 1042] ABRAHAM L. POMERANTZ resumed.

Direct examination continued.

By Mr. Updike:

Q. Mr. Pomerantz, when we finished yesterday, sir, you had before you Plaintiff's Exhibits 240, 241 and 242 for identification, and you had made reference to three monthly earnings statements which you recalled that you had seen and which had been placed in evidence in the hearings before Referee Fitzsimmons.

Now, having had an opportunity to examine them a little further than you could on the stand late yesterday, can you tell us now, sir, whether you ever saw Plaintiff's Exhibits 240, 241 and 242 before, or at least in connection with those hearings?

A. My best recollection is that I never saw any of those exhibits at or about the time of the hearings before the referee. In fact, I think I could very well make that stronger and say that the probabilities are rather strong, if not overwhelming, that I never saw such documents, Exhibits 240, 241 and 242 for identification at or near the time of the hearings or, in fact, until you showed them to me on the stand yesterday.

[fol. 1043] The Court: Might I see those?

The Witness: Yes, your Honor (handing to the Court).

The Court: You are talking about three documents entitled Investors Diversified Services, Inc., summary of operations for the month of January 31, 1950, summary of operations for the two months ending February 28, 1950, and summary of operations for three months ending March 31, 1950.

The Witness: May I suggest, to counter-distinguish those from the documents I did see and testified I saw, the ones you have before you have certain estimates or projections on the second or third page, and that is the thing that touched off my recollection.

The Court: You saw the ordinary reports for operations of those months but you did not see the supplemental statements which contain projections of earnings?

The Witness: That is my best recollection.

Mr. Updike: I offer them in evidence, if the Court please.

The Court: Received in evidence.

[fol. 1044] (Plaintiff's Exhibits 240, 241 and 242 for identification received in evidence.)

Mr. Updike: I likewise offer in evidence, if the Court please, Plaintiff's Exhibits 243 and 244 for identification which the witness also identified—

The Court: I think you mean Exhibits 245 and 246.

Mr. Updike: Yes, Exhibits 245 and 246, they are offered as having been identified by this witness yesterday, being documents that he had not previously seen.

Mr. Whittlesey: These documents came from the files of IDS in March of this year. There is no proof that they were ever shown to, seen by or sent to the defendant Kirby. There is proof that Mr. Purcell was shown them, had them and that he had the projections when he appeared before Referee Fitzsimmons. There is proof that Mr. Shipman had them and they were in the Alleghany files. There is no connection with the defendant Kirby with respect to any of these projections, and I object to their receipt on that ground.

The Court: For my information, Mr. Updike, what is [fol. 1045] the proof that ties these two documents, Exhibits 245 and 246 for identification, to Mr. Kirby?

Mr. Updike: Your Honor will recall that Mr. Purcell testified that he had full access to these documents, and that while he was confident of his recollection that the five-year projections, I believe he testified, for 1953 and later that he had, he did not undertake to state to your Honor that he had these particular projections that are here involved.

It is our position, sir, that through Mr. Purcell we have proved the receipt of these two documents, first coming to

him, second coming to Mr. Anzalone, and third through Mr. Shipman yesterday who testified that he knew that Mr. Kirby was receiving the reports from all three of those sources. We have tied these documents to Mr. Kirby and also knowledge of their existence.

The Court: I think Mr. Kirby denied that he had seen these.

Mr. Updike: He said he had no recollection.

Mr. Whittlesey: Further, if I may, Mr. Updike overstated that a little bit. He put in a letter from Mr. Shipman [fol. 1046] to Mr. Waag showing certain specified reports that were scheduled to be sent to Mr. Kirby. These projections are not listed on that letter, so there is no proof.

The Court: He was asking that the regular reports be sent. These, I think, Mr. Shipman or somebody said were not the regular reports, these were projections made by the accounting department of estimates of what they would do in the future, which were not regular reports.

Mr. Updike: I think that's correct; yes, sir.

The Court: As to these two, it seems to me you have the question of why Mr. Kirby is charged with knowledge of them. Mr. Purcell was, undoubtedly, because I think he saw them. But Mr. Purcell is not Mr. Kirby.

Mr. Updike: That is true. Mr. Purcell was a named co-defendant of Mr. Kirby's in that case and Mr. Purcell has testified that he had no difficulty in obtaining access to IDS documents as they were called for in the course of that case, and Mr. Kirby certainly had them available, he knew of their availability.

The Court: How did he know these particular documents [fol. 1047] were available? He knew reports were available, and he knew he could get any reports, how did he know affirmatively that there were these two particular documents?

Mr. Updike: For example, in the Froggatt report which your Honor admitted yesterday, there is a five-year projection which is one of the exhibits.

The Court: I admitted that. How did Mr. Kirby know that these two particular documents were in existence?

Mr. Updike: I cannot tie these two particular documents to Mr. Kirby's personal knowledge, except in the way that I have indicated, that is to say, he knew of the system.

The Court: He knew they were making projections.

Mr. Updike: He knew they were making projections, he knew of the system they had out there for such things, he was a man, as you pointed out, of considerable financial astuteness, and he certainly was under a duty, we think, to make available to the referee all of the documentation that there was out there which would include this one.

[fol. 1048] The Court: That is what bothers me about this. I think certainly if the referee asked for anything he was under the duty to provide it, or if Mr. Pomerantz asked him he was under the duty to provide it, but was he under the duty of going to Minneapolis and searching through all their files and saying, "Here is something which is a nice juicy item, I will have to take that back and give it to the referee."

That is really what you are presenting here.

Mr. Whittlesey: I want to point out the distinction between Mr. Kirby and Mr. Purcell. Mr. Purcell was a director of IDS and as such would receive things that IDS directors would receive. There is nothing more clear in this case, your Honor, but that documents in possession of IDS are not available to Alleghany as a matter of course or as a matter of demand.

The Court: That is why Mr. Kirby sent Mr. Purcell out there, to get them, as I understand it.

Mr. Whittlesey: I don't have any testimony to bear that out.

[fol. 1049] The Court: Mr. Purcell went out to find out what was going on in IDS.

Mr. Whittlesey: Mr. Purcell testified before the referee and was examined for one whole day, with counsel quite well aware that projections existed.

The Court: I think without further tying these to Mr. Kirby I cannot receive them as relevant evidence to Mr. Kirby.

I think the other three documents you put in, Exhibits 240, 241 and 242, they have some evidence tying them possibly to Mr. Kirby. So I will not receive these two in evidence.

* * * * * * *

[fol. 1050]. Cross examination.

My Mr. Whittlesey:

Q. Mr. Pomerantz, I wish first to direct your attention to Plaintiff's Exhibit 240 received in evidence, which is entitled summary of operations for the month ending January 31, 1950, and I direct your attention specifically to the figure on Exhibit B of that statement, and the amount of $105,539 under the heading 1950 actual as net income from operations.

Now I show you Exhibit K-180 in evidence, which bears the heading Investors Diversified Services, Inc., comparative balance sheet, January 31, 1950, and on page 3 thereof Investors Diversified Services, Inc., statement of net income and earned surplus for the month of January, and I call your attention to the figure on this second statement under the heading 1950, month of January, and net income from operations appears to be what?

A. $105,538.86.

[fol. 1051] Q. In other words, exactly the same as in the so-called summary of operations statement for the month—

The Court: 20 cents difference.

Mr. Whittlesey: 20 cents difference.

Mr. Updike: May I have that page again in the K exhibit?

Mr. Whittlesey: Page 3.

The Witness: Apparently they just dropped off the decimal point.

The Court: Dropped off the decimal point.

Q. Yes. Now I refer you back on 240 for identification, the summary of operations statement for the same month,

to the item of net income before profit on investment transactions and provision for income taxes, and what do you find on that exhibit for the month of January?

A. $113,753.

Q. And referring to K-180, the other statement for the month of January, what do you find for net income before profit on investment transactions and provision for income taxes?

A. Exactly the same, within three cents.

Q. Now, referring finally back to the January summary [fol. 1052] of operations statement, Exhibit 240 in evidence, we come to net income of Investors Diversified Services, and what do we have there?

A. A deficit of $104,338.

Q. Is there a corresponding figure on the operations statement for January, 1950, K-180 for identification?

A. I do not see a corresponding figure.

• • • • • • •

[fol. 1053] The Court: • • • What is the next question of Mr. Pomerantz?

Mr. Whittlesey: I think we can come back to this one.

Q. On this net income you will notice on Exhibit 240 [fol. 1054] it is parenthetical; in other words, indicating a deficit of $104,000, and similarly on the other net income statement for January of IDS, 180 for identification, it likewise appears as a deficit of $104,337, doesn't it?

A. I had better revise my testimony then—

Q. In other words, the figures are identical.

A. —to say that the deficit figure of $104,338 appearing on Exhibit 240 for identification has its counterpart in the exhibit, 180, in the form of a figure $104,337.57.

• • • • • • • •

[fol. 1055] Q. Referring to this matter of projections, Mr. Pomerantz, I show you Plaintiff's Exhibit 241 in evidence, which is the summary of operations statement of IDS for the month ending February 28, 1950, and call your atten-

tion to Exhibit B and specifically under the heading "Two months ending February 28" and there we have columns for 1950, one called "Projected" and the other without "Projected" on it.

A. The other is called "Actual."

Q. This exhibit is dated April 12, 1950, is it not?

[fol. 1056] A. That's right, sir.

Q. So in so far as they refer to projected 1950 income for the first two months, which is shown as how much, by the way?

A. $640,738.

Q. As against the actual of how much?

A. As against an actual of $657,687.

Q. That exhibit simply shows that at some time prior to its being made there had been a projection made as to what income for the first two months would be?

A. It showed that plus a fact that there had been a system or methodology of projections as a way of life.

Q. The exhibit itself does not show any projected income beyond February itself, does it?

The Court: Beyond the months.

A. That's right.

Q. It is really a recording of historical facts.

A. It is a recording of the projection in relation to the reality.

Q. The projection that had been made?

[fol. 1057] A. The projection that had been made in relation to how close to reality the eventuality showed it to be.

Q. Coming to this matter of projections, Mr. Pomerantz, I show you a letter dated February 11, 1950, received in evidence as Defendant Kirby's Exhibit 260 in this case, and in evidence in Zenn as Exhibit 327, and specifically call your attention to the third paragraph on page 3 of this letter.

A. I have no intention of quarreling with your choice of words, Mr. Whittlesey, but heretofore you and I have

used "projections" as meaning financial or operating statements, and now you show me something which is not an operating statement.

Q. I think Mr. Updike has used it in that sense.

A. I don't wish to quarrel with you.

Mr. Phillips: Object to that as incorrectly stating—

The Court: He is showing the document to you now, Mr. Pomerantz.

Q. I call your attention to the third paragraph which says what?

A. The third paragraph at page 3?

[fol. 1058] Q. Yes.

A. I will read it to his Honor:

"During 1950, the mortgage department"—if I may interpolate, that means of HDS, Mr. Whittlesey.

Q. Yes.

A. I continue reading:

> "—forecasts conservatively $8,315,000 gross income from mortgage operations, not including interest, with a net before home office expense of $5,720,000. I am told that these are very conservative estimates and take into account only business which is presently on the books."

The Court: What is this coming from, anyway?

The Witness: That is a letter from Mr. Purcell to Mr. Kirby and Mr. Young under date of February 11, 1950.

The Court: That was received in evidence by the referee in the Zenn case?

The Witness: That is correct, your Honor.

The Court: All right, I now understand.

[fol. 1059] By Mr. Whittlesey:

Q. Mr. Pomerantz, I show you what has been marked here Defendant Kirby's Exhibit 179 in evidence, which was

introduced before the referee in Zenn as Exhibit 397-C in evidence, being a statement of net income and earned surplus of IDS for the year ending December 31, 1949.

Specifically, I call your attention to page 1 of that statement which is headed "Gross Income."

A. Page 1 is the third page of the exhibit.

Q. Page numbered 1.

The Court: What is your question?

A. The item at the bottom of that page reads:

"Total gross income, $25,706,967.16."

Q. I direct you to the various items of gross income there, to one under No. 13 in the amount of $2,788,701.92, right?

A. I see that item.

Q. If you refer to page 5 of this exhibit, you find a reference to item 13 in considerably more detail, don't you?

A. That appears to be a breakdown of item 13 on page 1.

[fol. 1060] Q. of mortgage income?

A. Under the category "Other mortgage income."

Q. Would that category be comparable to the mortgage income referred to in Mr. Purcell's letter of February 11, 1950?

A. I would so regard it, Mr. Whittlesey, yes.

Q. In other words, whereas in 1949, as shown in the hearing before the referee, gross mortgage income was some $2,788,000 for the year, it was forecast to jump to something over 8 million in 1950?

A. I think that is a fair statement.

Q. Turning to the next page on this Exhibit 179, we find a breakdown of operating expenses, do we not?

A. Yes, we do.

Q. That totals how much for 1949?

A. $24,191,565.79.

Q. There you have an item 47, do you not, which is cost of mortgage operations?

A. It is called here probably the same as you say, mortgage agency expenses.

[fol. 1061] Q. If you refer over to item 47 on page 5, you will find a breakdown of that item, won't you?

A. Entitled and under the category, "Analysis of mortgage agency expense."

Q. It comes out to that same figure, $2,788,000?

A. Yes, one figure being a detailed breakdown of the other.

Q. On page 3 of the year end statement, we find an item 77, do we not, a net income from operations for the year 1949 of $1,515,401.37, right?

A. That's right, under item No. 77.

Q. And that is arrived at by subtracting the total of the expense item from page 2 from the total of gross income items on page 1?

A. That's right.

Q. All of which included mortgage operations?

A. Yes.

Q. If one were to transpose into those figures, and specifically the figures with respect to mortgage operations, the 8,315,000 projected for 1950 in view of the 2,788,000 [fol. 1062] which happened in 1949, and, correspondingly, adjusted the cost as indicated in Mr. Purcell's letter for 1950—

A. The projected costs.

Q. —you would come out with a projected operating income of something over 6 million dollars, would you not?

A. I thought it was 7 million, but your addition may be better than mine. But it was between 6 million-odd and 7 million.

Q. I would suggest accurately it would be 6,952,696 dollars.

A. I accept your arithmetic.

Q. If you look further at that statement, particularly page 3, referring to Exhibit K-179, you will find an item of share of earnings of subsidiaries in the amount of 1,127,000 dollars, would you not?

A. Yes, just below item No. 96.

Q. And if that is taken in to figure total income of IDS and added to operating income, you go something over 8 million dollars projected income of IDS for 1950?

A. On the assumptions you have stated, the conclusion would follow mathematically.

[fol. 1063] Q. It is calculable from the exhibits before the referee in Zenn?

A. On your premise, yes.

Q. The premise being of course that all other items of expense and income would remain the same?

A. That's right.

Mr. Whittlesey: I might point out to your Honor in that connection, you may recall that Mr. Purcell testified yesterday that in 1950 the principal item of income of IDS that varied from its numerous other items of income was the mortgage operating income.

The Court: That was due to the sale of a development in California.

Mr. Whittlesey: At the tail end of the year, yes.

Q. Mr. Pomerantz, do you recall that in the hearing before the referee, Mr. Kahn caused a subpoena duces tecum to be issued to Alleghany Corporation?

A. I do not.

Mr. Whittlesey: Mr. Updike, I ask you if you will stipulate that this is a true copy of a subpoena issued in the [fol. 1064] hearing before the referee to Alleghany Corporation and service acknowledged by Mr. David Wallace of Alleghany on October 31, 1955?

Mr. Updike: I accept your statement, Mr. Whittlesey.

Mr. Whittlesey: I offer that in evidence, if I may, your Honor.

The Court: What is the relevancy?

Mr. Whittlesey: It seems to me one of the very large issues that has been raised here as to what compliance was made by Alleghany with requests for production of documents, what was requested and what was done.

The Court: This shows they asked for documents, it will be received. They did not say they did not give the documents that were really called for. That is the problem you have got to meet, not what documents they asked for, what documents were not produced.

Mr. Whittlesey: You recall Mr. Graubard testified he was satisfied that there was full and complete compliance.

The Court: Mr. Pomerantz was satisfied too, otherwise he would have been raising hell, and which he would have [fol. 1065] a right to do.

(Defendant Kirby's Exhibit 356 for identification received in evidence.)

* * * * * * *

[fol. 1066] Cross examination.

By Mr. Kissam:

Q. Mr. Pomerantz, did you maintain any recording of the documents which you inspected?

A. No.

Q. Then I may assume that any documents which you inspected and did not offer in evidence, no record exists?

A. May I say it this way—

Q. I would rather have you say it my way.

Is there any record in existence which lists documents which were made available to you, Mr. Klinger, Mr. Haudek or anybody else, which were inspected and not offered into evidence, is there such a document?

A. Yes, but if you confine me to a categorical answer it will be a misleading one, Mr. Kissam.

Q. I merely want to know if there is such a document.

The Court: You may explain it.

[fol. 1067] A. Well, what I wanted to say, Mr. Kissam, is that we have no definitive catalog of inspected but not offered documents before the referee. There is no such document. We do, however, and this is why I cannot an-

swer you categorically, have here and there in our worksheets references to documents which we looked at and for one or another reason did not submit to the referee. So there is yes, some sporadic records of documents seen but not offered in evidence, and, no, there is no definitive catalog of such documents.

Q. In anticipation of this examination, did you bring your worksheets with you?

A. No. I have probably a dozen or more thickly padded envelopes which contain a miscellany of all kinds of scratch notes, and I did not look those files over with a view to gathering every piece of paper in them.

Q. When you inspected records, was Mr. Klinger and Mr. Haudek present at the same time?

A. I cannot answer that comprehensively. There were times when I looked at documents with Mr. Haudek along side of me, times when Klinger was with me, times when I [fol. 1068] was alone, times when the three of us were together.

Q. Were there times when Mr. Klinger examined documents alone?

A. I am sure there were.

Q. Were there also times when Mr. Haudek examined documents alone?

A. I take it your question means examined anywhere at all or in any particular location? I don't want to fence with you.

Q. Were there times when Mr. Haudek looked at documents when you or Mr. Klinger were not peering over his shoulder or looking at the documents after he passed them over to you?

A. Definitely, each of us in turn looked at documents separately as well as jointly.

Q. Wouldn't it be more fair to say that you really don't know precisely what Mr. Klinger examined in your absence and what Mr. Haudek examined in your absence?

A. That would only be qualifiedly fair to say. If you are asking for my opinion—

Q. I am not asking for your opinion.

A. I thought your question called for the operation of another man's mind.

[fol. 1069] Q. I will eliminate the word "fair." Isn't it a fact as to the documents which Mr. Haudek examined alone and as to the documents which Mr. Klinger examined alone you have no direct knowledge of what they examined?

A. It is true to say that in those cases where Klinger or Haudek examined documents in my absence, I have no direct knowledge of the documents which they examined in my absence.

Mr. Kissam: I have nothing more.

The Court: Mr. Phillips, you may go ahead.

[fol. 1070] Cross examination.

By Mr. Phillips:

Q. Mr. Pomerantz, do you recall testifying before Referee Fitzsimmons in Zenn against Anzalone?

A. Yes.

Q. Do you recall whether or not you testified with respect to the documents that you had seen?

A. That is my recollection. Not necessarily in specific, but in general.

Q. Do you recall whether you testified you had no recollection as to what documents you had seen?

A. I don't recall it that way. I do recall having said that I could not recall specifically each and every piece of paper that I looked at, Mr. Phillips, during the long periods of time that we were examining documents.

I believe you will find that that was the thrust of my answer.

* * * * * * *

[fol. 1071]

COLLOQUY BETWEEN COURT AND COUNSEL RE EXHIBITS

The Court: What is next?

Mr. Updike: Now, if the Court please, I would like briefly to return to the discussion that we had before Mr. Pomerantz began to testify this morning, and I would like to reoffer Exhibits 245 and 246 for identification, pointing out to your Honor that in our view Mr. Kirby's duty was broader than just those documents that he had in his files; it was as broad as his area of knowledge went with respect to the existence of projections and—

The Court: Well, if you show that he had knowledge of them, where they were, that is the problem that you have got. These two documents, there has been nothing to tie them in to Mr. Kirby at all so far in the testimony. Where the documents are tied in to Mr. Kirby I have received them in evidence for what they were worth, but here you just pull two documents out of the file and say, "We offer them."

Now, you have got to do something to tie them in to the defendant.

Mr. Updike: Well, these documents, of course, are authenticated as coming from Investors Diversified Services.

[fol. 1072] The Court: That's correct, I understand.

Mr. Updike: And it seems to me, sir, that the three quarterly earnings statements that you have admitted this morning, Plaintiff's Exhibits 240, 241 and 242, are predicated upon the existence of such, of this particular exhibit, which is 246, which lays out the monthly projections which appear in those—

The Court: I have ruled on this. Those documents—there was some evidence that Mr. Kirby had them in his possession or that they were sent to Mr. Kirby. I said, therefore, we will receive them for what they are worth. These two documents, there is nothing to tie them to Mr. Kirby's knowledge. They were from the files of a separate corporation. He was an officer of Alleghany which had

control of IDS, but did that prove that he knew about these documents?

I will not change my ruling on that until you get something to tie them in to Mr. Kirby.

Mr. Updike: You also asked me, sir, with respect to materiality of the difference that the presence of these documents would have made in front of the referee.

The Court: Yes.

[fol. 1073] Mr. Updike: You cited me the decision which you said you would study, but I draw your Honor's attention that on page 53 that the referee states:

> "Taking the January and February earnings together, which were well known to Young, there was certainly nothing to indicate a drastic rise in the earnings of IDS."

Again, in the second paragraph below that, the referee says:

> "The average monthly earnings for the first quarter of 1950 were about $213,000, which was less than the earnings of November, 1949 ($370,000); the first quarterly earnings of 1950 were therefore not necessarily indicative of a further drastic rise in the earnings of IDS."

Now, it seems to me, your Honor, it is clear that had the referee had before him a forecast which was more than drawn out by subsequent events, and therefore accurate or reliable in that sense, had he had before him a forecast which showed that the rise which he referred to was a spectacular rise in the period from 1948, the end of '48 [fol. 1074] to the end of 1949, which was from $350,000 to $1,350,000, if he were confronted with a rise that would carry that up to some 7 or 8 million dollars, if the earlier rise was spectacular, this was in the category of a Hollywood colossal, and so on, and therefore I think it would be clearly material.

The Court: I notice that the referee also said on page 55:

> "Taking a broad view of the situation, it seems to me that the documentary record stating and even overstating the recent prosperity of IDS and the frank expression of hope for an unusually promising future, negate the contention of general counsel for plaintiffs and objectants that Young and Kirby did not adequately inform the stockholders of Alleghany of IDS future prospects."

The referee undoubtedly had before him new statements as to the frank expression of hope for an unusually promising future. He undoubtedly knew that there were those things. Whether he had this particular document before him, I think may be the question. But why I raise the [fol. 1075] question of materiality is, is it anything more than a legal difference? He had the statements of the unusually promising future, would it have made any difference if he had that particular document before him?

* * * * * * * *

[fol. 1076] Mr. Updike: May it please your Honor, in order to complete certain of the formal requirements of the plaintiff's case, I first offer Plaintiff's Exhibit 190 for identification, which is a copy certified by the clerk's office in Baltimore, Maryland, with respect to the provisions of the certificate of incorporation of Alleghany Corporation as they existed on December 6, 1949.

The Court: And just for my own information, tell me what the relevancy is.

Mr. Updike: Well, sir, you will recall that we raised an issue with respect to this quorum problem which your Honor pointed out the other day was a problem heard by and decided by the referee, but we thought that we should put in the proof to show the status of the articles of incorporation, the by-law provisions with respect to a quorum; we should establish the literal chain of documentation to show the eligibility of Messrs. Kirby, Young,

Purcell and Anzalone; that we should put in the board minutes themselves; we should put in the proxy material.

The Court: That is a large volume. What is it that I [fol. 1077] particularly have to look at in there?

Mr. Updike: Well, all that you would have to look at, and we would, of course, excerpt this out, sir, is whether there was a material misrepresentation to the Alleghany shareholders when the statement was made in the proxy material that the resolution was adopted; that is point number 1. And point number 2, that there was no need as the proxy material states, there was no need to submit the question to the Alleghany shareholders which relegated it into quite a different area from a proposition being submitted to them for their serious vote and consideration.

The Court: Well, do you say Mr. Kirby is responsible for that?

Mr. Updike: Yes, sir. He signed the proxy material as president of Alleghany.

The Court: Is he responsible for what was before the referee on that point?

Mr. Updike: It seems to me, sir, that he was there as a proponent of a settlement and he is seeking now to obtain the protection of that settlement, and therefore he has responsibility to that extent, yes, sir. Indeed, I think he also had responsibility in another direction. If you [fol. 1078] regard the posture of Mr. Kirby, let's say, in November of 1959, as a man against whom Alleghany Corporation owned a chose in action for a sum of money, substantial sum of money, he was engaged in a personal self-dealing transaction when he made the renewed settlement arrangements in late 1959.

The Court: That was the issue before the referee, wasn't it?

Mr. Updike: I beg your pardon?

The Court: That was an issue before the referee in proving the adequacy of the settlement.

Mr. Updike: The quorum question, yes, indeed, it was, sir.

The Court: I notice on page 58 of the referee's report, which is Exhibit K-137, he says: "It is clear that a director's resolution alleged to be ineffective can be ratified by the stockholders. In this instance the resolution of December 6, 1949, was approved by the stockholders on May 3, 1950. The proxy statement and the supplementary letter to the stockholders fully revealed the personal interest of the directors in the exchange transaction. Accordingly I do not feel that this argument of the objectants has much weight."

Now, that was an issue that was before the referee.

[fol. 1079] Mr. Updike: That was an issue that was before the referee.

The Court: And which, if the matter had been appealed, could have been taken up on appeal on the adequacy of his record to reach that conclusion, but in this case—and this is the thing that puzzles me—don't you have the burden of proving that Mr. Kirby deliberately did something which deceived the referee, not that the referee made a wrong determination? That may happen in any case.

Mr. Updike: That is right.

The Court: But you cannot set aside a judgment merely because the trier of the facts reached the wrong conclusion on the facts and the law. In order to set it aside you have got to show something affirmatively done by the person you are suing.

Now, what affirmatively was done by Mr. Kirby?

[fol. 1080] Mr. Updike: We have to show, I think, two things, sir. One is that the cause of action had validity as it stood before the referee and, second, we have to show that Mr. Kirby made a material misrepresentation so far as the Alleghany shareholders were concerned, and that Mr. Kirby failed in his duty when he did not call to the attention of the referee the mistaken purported quotation from the articles of Alleghany upon which we think the referee relied in deciding the issue the way he did.

The Court: I will receive the paper in evidence for what it is worth.

Mr. Whittlesey: The exhibit which he is offering is a copy of the same exhibit which was Exhibit 11 before the referee.

Mr. Updike: This is a certified copy from the clerk's office showing all the amendments down to date from which we will extract what was before the referee.

Mr. Whittlesey: This was before the referee, yes.

The Court: This has a lot of things which were subsequent to the hearing before the referee.

[fol. 1081] Mr. Updike: May we propose this, sir, may we make a comparison of Defendant Kirby's Exhibit 306 for identification, which Mr. Whittlesey has handed me, and substitute that for Plaintiff's Exhibit 190, we feel an obligation to show there were no amendments.

The Court: Up to the date of the hearing before the referee. I notice you have a lot of things in there, a designation of resident agent, change designation of resident agent, things like that, which are part of the corporate history but have nothing to do with the issue before me.

What is next?

Mr. Updike: In this connection, I offer Plaintiff's Exhibit 191 which is a certified copy of the bylaws with respect to the number for a quorum.

The Court: Was that put in before the referee?

Mr. Whittlesey: It was Exhibit 12 before the referee, your Honor, if we are talking about the same one. I haven't seen what Mr. Updike has handed up.

The Court: Show that to Mr. Whittlesey.

[fol. 1082] Mr. Whittlesey: Before the referee we handed up, I believe, a complete volume.

The Court: Why not compare it and see.

Mr. Updike: I next offer Plaintiff's Exhibit 206 for identification.

The Court: Can you compare that so I can pass upon it?

Mr. Updike: This is the form in which it went before the referee.

The Court: I haven't ruled on the previous one, you were going to compare that. I just don't like to leave the

record incomplete. If that which Mr. Updike offered is agreed upon by both sides, I will take it.

Is that an accurate statement?

Mr. Whittlesey: That is an accurate statement of that section of the bylaws, and I would ask Mr. Updike if he would stipulate that that particular section was offered in evidence in Zenn as part of the bylaws which were introduced as Exhibit 12 which we just compared.

Mr. Updike: I accept that representation.

The Court: We will receive it in evidence.

(Plaintiff's Exhibit 191 for identification received in [fol. 1083] evidence.)

The Court: What is next?

Mr. Updike: I now offer Plaintiff's Exhibit 206 for identification which was, I believe, Plaintiff's Exhibit 27 before the referee in Zenn, being the minutes of the meeting of directors of December 6, 1949.

The Court: Any objection?

Mr. Whittlesey: That is the same as Exhibit 27, and there is no objection.

The Court: Received in evidence.

(Plaintiff's Exhibit 206 for identification received in evidence.)

Mr. Updike: I now offer Plaintiff's Exhibit 199 for identification, being the principal proxy statement by Alleghany Corporation addressed to the shareholders of Alleghany in connection with the meeting announced for May 3, 1950.

The Court: What is the relevance of that in this proceeding?

Mr. Updike: It is in this document that the Alleghany Corporation stated to the shareholders that (a) the resolution was properly adopted by the board, making the tender, [fol. 1084] and (b) that it was unnecessary to submit it to the shareholders.

The Court: What is the relevance of that in this pro-

ceeding? That is what puzzles me. I am not trying an appeal from the referee's decision. What is the relevancy of that in this case which you are bringing against Mr. Kirby?

Mr. Updike: We conceive it to be the plaintiff's first obligation to show there was a valid cause of action here against Mr. Kirby, and this we have done only in skeleton form in accordance with your Honor's pretrial ruling, and to make out this aspect of that cause of action we have to show what his statement was to the shareholders, and there is a companion statement.

The Court: There was a cause of action asserted against Mr. Kirby, there is no doubt about that, in Zenn against Anzalone. That cause of action was settled. The settlement was approved by the State Court. Now you are trying to prove that the settlement should be set aside.

It seems to me that is the issue you have, not the issue of the underlying cause of action. We are not reviewing the referee's decision. We are simply reaching a conclu-[fol. 1085] sion as to whether the settlement should be set aside.

Mr. Updike: Whether in that connection Mr. Kirby failed to bring forward information which he knew or should have known in connection with the trial of that issue before the referee.

The Court: What does this proxy statement have got to do with that latter point?

Mr. Updike: Because in our view, sir, he knew there was no valid quorum at that meeting and in submitting this to the stockholders—

The Court: How do you prove that?

Mr. Updike: He was one of the four directors who was present and voted this transaction to himself and the three others when there were only seven directors present.

The Court: How do you know that he knew what the state of the law was?

Mr. Updike: I think the directors are charged with

knowledge of the contents of their articles of incorporation and their bylaws.

The Court: If you think it is important, I will take it.

Mr. Whittlesey: Mr. Updike, will you stipulate that that was Exhibit 30 in Zenn?

[fol. 1086] Mr. Updike: It was, and it is now Plaintiff's Exhibit 199 for identification.

(Plaintiff's Exhibit 199 for identification received in evidence.)

Mr. Updike: A companion piece is a document marked in Zenn as Plaintiff's Exhibit 32, which is marked here as Plaintiff's Exhibit 198 for identification, the so-called additional material in connection with the proxy statement.

The Court: I will receive it.

(Plaintiff's Exhibit 198 for identification received in evidence.)

Mr. Updike: Finally, as my last exhibit in connection with this issue, I offer Plaintiff's Exhibit 195 for identification, being the annual report of Alleghany Corporation for the year ended December 31, 1949.

The Court: Was that put in evidence in Zenn?

Mr. Whittlesey: Yes, as Exhibit 17, your Honor.

The Court: Received.

(Plaintiff's Exhibit 195 for identification received in evidence.)

[fol. 1087] Mr. Updike: Your Honor, the other day I asked the Court's leave to supplement Plaintiff's Exhibit 399 in view of the controversy over the requests for the introduction of documents and whether those requests had been complied with in the hearings before the referee.

I now offer two books of additional portions of the Zenn v. Anzalone transcript in that connection, undertaking to specify to your Honor the specific pages relied on so that the whole volumes will not have to be studied, sir.

The Court: All right, I will receive them. What number are you giving that?

Mr. Updike: I suggest we make it 399-A and B so that it will go along with 399.

The Court: All right.

(Plaintiff's Exhibits 399-A and 399-B received.)

Mr. Updike: Now, if it please your Honor, I offer Plaintiff's Exhibit 356 for identification, which constitutes a description and list of all of the exhibits introduced in Zenn v. Anzalone, supplemented by a list of exhibits marked for identification on the depositions of Mr. Wallace and Mr. [fol. 1088] Young in Zenn Federal, so that when we urge to your Honor that a particular document was not adduced or marked, I should say, was not marked before Referee Fitzsimmons, there will be a document in evidence from which this can be verified.

The Court: Well, now, you are relying upon, as I understand, three or five documents that were not introduced, and you have got proof of that. Why do we need this long list?

Mr. Updike: Well, my primary reliance is on those three or five documents, but we have—.

The Court: Those are Exhibits 245, 246, 248, as I understand it.

Mr. Updike: 348, 240, 241, 242. There are some documents that have just been referred to along the way in the course of the transcript. Whether they were or were not marked in Zenn may be open to some dispute, and in order to eliminate it for this record, we thought that we were obligated to prepare a list.

The Court: That may be very helpful, but I would like to get for my study of the case exactly what documents you have here introduced which you say Mr. Kirby was responsible for and that were not introduced before Zenn. Can you give me a list of those, I mean the exhibits in the present case?

[fol. 1089] Mr. Updike: We rely, sir, on the Froggatt report.

The Court: What number?

Mr. Updike: Which has been marked 220, Plaintiff's Exhibit 220 in evidence.

We rely on the summary of operations for January, '50, which is 240 in evidence, 241 in evidence, 242 in evidence, 243 in evidence, 244 in evidence, 252 in evidence.

The Court: That is six documents which are in evidence in this case that you say should have been produced before the referee but were not.

Mr. Updike: 256, which is marked 336.

The Court: What is the number?

Mr. Updike: 336.

The Court: All right.

Mr. Updike: 257, 335—that is the exchange of correspondence between Shipman and Waag and then Shipman back to Waag which specifies the reports that were to go to Mr. Kirby. Number 262—

The Court: What is 262?

Mr. Updike: That is a communication from Mr. Waag to one of his assistants with a list of reports attached to it, reports that were received by Mr. Purcell.

[fol. 1090] The Court: But that may be proof that Mr. Kirby got a report, but what I want to know is what documents you say Mr. Kirby should have produced? That may be part of your proof here, but I am trying to get this to the point of what documents do you say that are in evidence here that Mr. Kirby should have produced before the referee and did not. That document he certainly did not have to produce before the referee. That may be part of your proof that he had these documents.

Mr. Updike: If the Court please, it seems to us that it was incumbent on Mr. Kirby to produce before the referee a document from his file if it showed what reports he knew that IDS was furnishing and could furnish.

The Court: All right, 262. Anything else?

Mr. Whittlesey: You will stipulate, won't you, Mr. Updike, that 262 came from the files of IDS?

Mr. Updike: That is right, yes.

Number 300, number 303, 304, 308, 310—now, these are

documents from Mr. Kirby's files which we believe show his knowledge with respect to this company.

318, 322 and 323, 331—that is the one which shows the Froggatt report going to Mr. Kirby in August of 1949.

[fol. 1091] Mr. Kissam: Saying "Return immediately," is that the one?

Mr. Updike: About a month later.

Number 335—I beg your pardon, that is a repetition. I'm sorry, sir. Number 339, number 348—that is the summary of operations from Mr. Kirby's files.

Number 351.

Now, that list, your Honor, are documents—

The Court: That are in evidence in this case that you say that Mr. Kirby should have had introduced in the Zenn case but were not introduced in the Zenn case.

Mr. Updike: Yes.

The Court: Thank you. That is what I wanted.

Mr. Updike: Either the documents, or he could have contributed the fact content of it.

Then the other documents that we have introduced or sought to introduce go to what we claim Mr. Kirby should have known, and in that sense he was under a duty to adduce.

The Court: Now you are now offering a list of the exhibits that were put in in the Zenn case?

[fol. 1092] Mr. Updike: Yes, sir.

The Court: All right, I will receive it.

Mr. Updike: 356 for identification—this is subject to check and correction by Donovan, Leisure and Kissam & Halpin and Mr. Phillips, if he desires. This is 356 for identification, and we have also done the same thing for the deposition proceedings prior to the hearings before the referee, the depositions of Messrs. Wallace and Young in Zenn Federal which I suggest might be marked Plaintiff's Exhibit 356-A.

The Court: All right. Those will be received in evidence.

Mr. Whittlesey: Might I see that, please?

Mr. Phillips: Mr. Updike, is that the green folder?

Mr. Updike: Mr. Whittlesey wants to have a look at it, Mr. Clerk.

Mr. Kissam: The green one has already been marked 354.

Mr. Updike: It is a different green one.

Mr. Phillips: You say this copy has been given to me, Mr. Updike?

Mr. Updike: No, it will be.

Mr. Phillips: Oh, will be.

[fol. 1093] Mr. Updike: Check.

Mr. Phillips: But you are offering it now?

Mr. Updike: Yes.

The Court: All right, what's next?

Mr. Phillips: Your Honor, we have not seen this document.

The Court: It is taken subject to correction after you have had a chance to check it. What is next?

Mr. Phillips: Well, I object to it on the ground that I have not seen it.

The Court: It is taken subject to corerction after you do see it.

All right, what's next?

Mr. Whittlesey: Might I ask Mr. Updike if he would stipulate that Exhibit 252 in evidence, which is the Saunders, Stiver report of March 15, 1949, which he refers to in his answers to our interrogatories, was found in the files of the SEC? It is so indicated by your answers.

Mr. Updike: I will so stipulate.

The Court: All right, what's next, Mr. Updike?

(Plaintiff's Exhibits 356 and 356-A received.)

Mr. Phillips: Is this the list of exhibits, Mr. Updike?

[fol. 1094] The Court: Yes, that is the list of exhibits. What's next?

Mr. Kissam: Your Honor, could I inquire if page 1 of the green one has 354 on it, on your copy? The first page, is there a little marking on that, may I ask?

The Court: It says 354 for identification.

Mr. Kissam: So does mine. That is what I was trying to draw Mr. Updike's attention to. If he wants to add confusion to the record by having two numbers for one exhibit—

Mr. Barnes: The reason for that is that 354 is the premarked number for the entire Wallace exhibit, Wallace deposition in this case. This is just a listing of exhibits.

The Court: It is now marked Exhibit 356 in evidence in this case.

Mr. Updike: 356-A, sir.

The Court: 356-A.

All right, what's next?

Mr. Phillips: Mr. Updike, I notice in this exhibit that there is a list of all the exhibits that went in, and I assume you are not offering it for any purpose relating to any [fol. 1095] transaction other than the 1950 transaction.

Mr. Updike: I certainly am not. It is a complete list of exhibits in order to avoid any issue as to whether one document there bore on more than one issue before the referee.

The Court: All right. I have taken them.

What's next?

Mr. Updike: Your Honor, a day or so ago I made a representation to you, sir, to furnish testimony given by Mr. Wallace with respect to the non-availability of documentation at Allegheny.

I now direct your Honor's attention to pages 899, 900, 901, 902 and 903 of the record before the referee which contained the material to which I referred and which I will be glad to read.

The Court: All right, if you want to read it.

Mr. Updike: I think it is adequate to show that my statement had support, and I don't offer it for any other purpose.

The Court: Go ahead and read it.

Mr. Updike: This is questioning by Mr. Graubard, Mr. Wallace was on the stand:

"Q. Would you check your records again, please, Mr. Wallace, in order to ascertain whether or not there is any

[fol. 1096] memorandum, letter, note, document, or any evidence of any transaction, in writing or print or any form whatsoever, which has been turned over to Mr. Pomerantz, but which is in the possession of Alleghany Corporation?

"A. I will have someone in my office do that; yes, sir.

"Mr. Daly: I do not proposed to do that at all, your Honor.

"Mr. Graubard: I am not asking Mr. Daly to do it. He is going to be in California.

"Mr. Daly: I am going to direct the witness not to do it.

"Mr. Graubard: Does the witness take directions from Mr. Daly with respect to this? Does he take directions from Mr. Daly in this matter?

"The Witness: No, in this matter I will act on my own.

"I appreciate Mr. Daly's advice, but I will someone check.

"I do not see any purpose in it, but I will to it that it is done.

"Mr. Daly: I object on behalf of the defendant directors [fol. 1097] to such request. It is too broad, it is meaningless.

"The Referee: It is harmless, also. You can also say that about it.

"Mr. Daly: You can say that, too.

"Mr. Graubard: I hope not, your Honor; I hope that there will be a real punch to this.

"The Witness: Mr. Graubard, I would like to say this here, if I may:

"If you have in mind any particular document, I wish you would tell me, because the files of Alleghany are extensive, and I knew you were looking for some particular document I would do my level best to dig it out.

"The Referee: Off the record."

Then they went back on the record.

"The Referee: Go ahead, Mr. Graubard.

"By Mr. Graubard:

"Q. I am particularly interested, Mr. Wallace, in any memoranda bearing upon any transactions of IDS, of which Alleghany was informed.

"I should like to know, for example—and perhaps you can tell us offhand—whether in 1949 there were any written [fol. 1098] weekly statements which were made up, of the values of securities or purchases or sales or contracts of IDS.

"Mr. Daly: Made out by whom?

"Mr. Graubard: I do not know by whom. Anything at all from IDS along that line.

"The Witness: Made up by the management of IDS?

"Mr. Graubard: That is right.

"The Witness: May I say this:

"As I testified this morning, Mr. Purcell was the officer who, until 1953, was directly in charge of Alleghany's investment in IDS.

"When he left to go out to IDS, he took with him a great many papers.

"Since then I have checked with IDS, because I do not have any such reports in my file.

"They tell me that the quality of reports that IDS prepares are just staggering, and that they never had Mr. Young on a list for these reports, generally, and as a specific report I will do my best to find out.

"Q. Did they have Mr. Purcell on their list, in 1949?

"A. I will find that out. As to what reports, as to the [fol. 1099] value of securities?

"Q. Anything bearing on the value of securities. There is no mystery about this at this time.

"A. There is considerable mystery to this, sir.

"The Referee: Let us cut this out. We will proceed by question and answer from this point on.

"In that way we will be able to move ahead much faster.

"Q. I want anything bearing upon the earnings of IDS and, therefore, the value of its stock, at the end of 1949, during the fall of 1949, and the spring of 1950.

"A. I couldn't undertake to do that.

"Q. In the files of Alleghany.

"A. Well, I know now that there is nothing in the files of Alleghany, Mr. Graubard.

"The Referee: All right, that is an answer, there is nothing in the files of Alleghany on that score."

Mr. Kissam: Are you stopping?

The Court: Does something go on afterwards?

[fol. 1100] Mr. Kissam: Yes.

"Q. Have you checked the Alleghany files for that, for that period?

"The Referee: (To witness) Yes or no.

"A. As to material coming from IDS?

"Q. Yes.

"A. Other than annual reports and documents already submitted, I said, 'Yes'; but I said I strongly suspect that when Mr. Purcell left Alleghany in 1953, he may have taken with him quite a few reports; but, as you will recall, I testified this morning that Mr. Purcell was leaving to assume the duties of chairman of the board of IDS."

And it goes on and on, your Honor.

Mr. Updike: If you want me to continue, I will.

The Court: Apparently there was a question asked for information from Alleghany Corporation. Now you say there were certain exhibits which you have identified here this afternoon that were not produced. Where do we go from here?

Mr. Kissam: May I attract your attention—

Mr. Updike: I merely made the statement that it was [fol. 1101] my recollection that Mr. Wallace had testified there were no such documents in Alleghany's files.

The Court: I don't think the testimony you just read quite says that.

What is the next question?

Mr. Kissam: The question before the one where Mr. Updike commenced at page 898 reads:

"Q. Did you turn over to Mr. Pomerantz all the data that you found in your files, pertaining to this IDS transaction?

"A. To the best of my knowledge, I did. I know that I turned some of it over to him, and I got it right back, on the same grounds as this letter of Mr. Anzalone was not placed in evidence."

That is on page 898 and going over to page 899.

The Court: What is the next question?

Mr. Updike: Your Honor, the category of documents not connected with Mr. Kirby by any personal link, but which in our view he should have known in the language of our complaint, I have a group of documents, first of which is Exhibit 221 for identification.

[fol. 1102] The Court: What is it?

Mr. Updike: The Froggatt report.

The Court: What proof is there that Mr. Kirby saw it?

Mr. Updike: None as such, your Honor, there is just the general familiarity that we believe we have demonstrated here of Mr. Kirby with the affairs of IDS through Alleghany and through his inquiries prior to Alleghany's acquisition.

The Court: I will not take it on any such vague connection as that. You have got to tie it in to the defendant.

Mr. Updike: From your prior rulings, I understood that. May I now have the ruling excluding Plaintiff's Exhibit 221 for identification?

The Court: On your statement that you have no proof connecting it directly with Mr. Kirby except your contention that he should have known about it, I will exclude it.

Mr. Updike: The next one is a Froggatt report for May 16, 1951, which is Plaintiff's Exhibit 222 for identification.

The Court: Same situation?

[fol. 1103] Mr. Updike: The same situation.

The Court: Same ruling.

Mr. Updike: Plaintiff's Exhibit 223 for identification, a letter from Joseph Froggatt & Company which purports to provide a valuation basis for Investors Syndicate of Canada, but as to which we do not claim any direct connection with Mr. Kirby.

The Court: Same ruling.

Mr. Updike: Plaintiff's Exhibit 224 for identification, which is the Rossetter report for the year ended December 31, 1948.

The Court: The same situation?

Mr. Updike: I would say so.

The Court: Same ruling.

Mr. Updike: The next offer is Plaintiff's Exhibit 226 for identification, which is the Rossetter report on IDS for the period ended December 31, 1949.

The Court: Still the same situation, no proof that Mr. Kirby knew about it?

Mr. Updike: No proof of direct connection with Mr. Kirby.

The Court: Same ruling.

[fol. 1104] Mr. Updike: Plaintiff's Exhibit 230 for identification, which is a statement by George Rossetter & Company entitled "Financial Statements for the Three Years Ended December 31, 1949, For Use in Prospectus."

The Court: Same situation?

Mr. Updike: The same situation.

The Court: Same ruling.

Mr. Updike: Plaintiff's Exhibit 231 for identification, which is the financial statement for the year ended December 31, 1950, for use in filing with registration statement form by Peat, Marwick, Mitchell & Company.

The Court: Any proof that Mr. Kirby had it?

Mr. Updike: We are checking that, sir.

No, sir.

The Court: I will make the same ruling.

Mr. Updike: Plaintiff's Exhibit—

The Court: I am making these rulings on the basis that

you can go to a corporation and get a lot of things out of the files. But here the claim is that Mr. Kirby personally concealed something from the referee, and the problem is, was he charged with things about which there [fol. 1105] is no proof that he saw or knew about. You have to bring definite proof here proving that Mr. Kirby had something that he concealed.

Mr. Updike: Our charge is not only that he personally knew but by reason of his corporate office was bound to know.

The Court: You say he personally knew?

Mr. Updike: He did not. As to some, we claim that he personally did.

The Court: If you have proof that he personally knew, I have received them in evidence.

Mr. Updike: I believe that has been the basis of your Honor's rulings.

Next is Plaintiff's Exhibit 234 for identification, which is the State of Minnesota's Department of Commerce and Banking Division report on IDS at December 31, 1949.

The Court: Same situation?

Mr. Updike: Same situation.

The Court: Same ruling.

Mr. Updike: We do not connect it with Mr. Kirby on any basis of personal knowledge.

I offer Plaintiff's Exhibits 236, 237 and 238 all for [fol. 1106] identification, being monthly summaries for the months ended September 30, 1949, October 31, 1949 and November 30, 1949.

As to these, there is evidence that they went to Mr. Kirby as Mr. Shipman testified.

The Court: Received in evidence.

(Plaintiff's Exhibits 236, 237 and 238 for identification received in evidence.)

Mr. Whittlesey: On those I would wish to suggest to you that there is no proof they were received by Mr. Kirby at all except that Mr. Shipman in a letter to Mr. Wallace

dated September 16, 1949, which is in evidence, requested that such reports be sent. They were not found in Mr. Kirby's files.

Mr. Kirby testified he had no recollection of ever seeing them. All that Mr. Shipman was able to say was that he had heard no complaints that they had not gotten them. That does not bear out Mr. Updike's statement that there was testimony that Mr. Kirby received them.

The Court: I have received them for what they are worth.

Mr. Updike: I likewise offer Plaintiff's Exhibit 338 [fol. 1107] for identification, which was produced from Mr. Kirby's files and which is denominated "Financial statements Investors Syndicate of America for the three years ended December 31, 1949."

Mr. Whittlesey: I don't see what relevance those have at all.

The Court: What is the relevancy of these?

Mr. Updike: Your Honor, apart from its relevancy as showing Mr. Kirby's familiarity with this particular subsidiary, this ties in with the exhibit which your Honor admitted yesterday where Mr. Kirby had received and had produced from his files a statement of his company for the month of December, 1949, which contained projections with respect to that company's business.

The Court: I will receive it.

Mr. Whittlesey: The annual reports of this company for the years 1948 through 1953, were produced before the referee in the Zenn hearings as Exhibits 51 through 56.

The Court: I realize that. I think we are getting in a lot of paper here which does not have a great significance [fol. 1108] to the issue, but if it is connected with Mr. Kirby I will take it.

(Plaintiff's Exhibit 338 for identification received in evidence.)

Mr. Updike: I offer Plaintiff's Exhibit 249 for identification, which is the annual report of Investors Syndicate of Canada for the period ended December 31, 1949.

The Court: What is the particular relevance of that?

Mr. Updike: This was not something that was before the referee, and in our view, by looking at the notes of the accountants, it can be demonstrated that there was an understatement of the assets of this business to this extent of about 1,600,000 dollars, and that in itself was about $5 a share on the IDS Class A stock.

The Court: You say this statement shows an understatement of value?

Mr. Updike: That is our contention.

The Court: You say Mr. Kirby should have produced a statement to the referee which shows an understatement? You are objecting to this thing which you say is a misleading [fol. 1109] statement and was not produced by Mr. Kirby?

Mr. Updike: Yes. If the referee had had this before him, he could have concluded that Investors Syndicate was worth substantially more in the IDS asset picture than appeared on IDS books.

Mr. Whittlesey: May I ask Mr. Updike if this exhibit came from the files of IDS and was unearthed as a result of depositions taken out there in March?

Mr. Updike: Yes.

Mr. Whittlesey: You do not claim they came from Mr. Kirby's files?

Mr. Updike: I do not.

The Court: How do you tie it in with Mr. Kirby?

Mr. Updike: Only on the basis as I have offered the remainder of these documents, that Mr. Kirby quite independently of what he personally knew as a director and as president of Alleghany could not delegate his responsibility to be a director and to be the president of Alleghany, and in the circumstances that were present in front of Referee Fitzsimmons, even if Mr. Kirby was physically [fol. 1110] unable to testify, he could have and should have seen to it that the full documentation, the full and frank disclosure that is called for by so many of the authorities in the field was made, and he did not do it.

The Court: You say he did not know about this document, but he should have produced it?

Mr. Updike: Just borrowing from your Honor a little while ago, I do not suggest for a moment that the president of a corporation knows every document that is in the corporation, but I do say he owes a duty to have the documents that are there and available produced by somebody, and that he has some obligation to see it is done.

The Court: You say there is no proof that he knew this document was there, is that it?

Mr. Updike: That's correct.

The Court: I will not receive it in evidence.

Mr. Updike: That completes my share of the plaintiff's case.

The Court: Anything more from you, Mr. Carter?

[fol. 1111] Mr. Carter: Yes, your Honor, on the corrupt bargain phase of this litigation, on the issue of the separability of the Kirby settlement, first I would like to offer into evidence as Plaintiff's Exhibit 11 the judgment signed by Judge McGivern in Zenn-Anzalone, dismissing the complaint as to the defendant Allan P. Kirby.

The Court: Received in evidence.

(Plaintiff's Exhibit 11 received.)

Mr. Carter: And then similarly as Plaintiff's Exhibit 12 in evidence the judgment in Zenn-Anzalone signed by Judge McGivern, dismissing the complaint as to the defendant Anita O'Keefe as executrix, et cetera.

The Court: Received in evidence.

(Plaintiff's Exhibit 12 received.)

Mr. Carter: And as Plaintiff's Exhibit 13, again in Zenn-Anzalone, the judgment signed by Judge McGivern dismissing the complaint as to the defendants Clint W. Murchison, Jr. and all others named with the exception of those in the previous exhibit.

The Court: Received in evidence.

(Plaintiff's Exhibit 13 received.)

Mr. Carter: Then last, as Plaintiff's Exhibit 16 in evidence, the special release dated the 29th of December, 1959,

[fol. 1112] signed by Charles T. Ireland on behalf of Alleghany Corporation, releasing Allan P. Kirby from all demands, et cetera, that Alleghany Corporation might have against—

Mr. McDonald: That is already in evidence.

Mr. Carter: No, there was a general release, Mr. McDonald, but this is a special one.

Mr. McDonald: You put in every one of them, and that one you have in mind is—

The Court: What number is it, Mr. McDonald?

Mr. McDonald: 155-G is the release that you are talking about, which was put in evidence the other day.

Mr. Carter: Mr. McDonald is quite correct, your Honor, so I will withdraw that, sir.

The Court: All right.

Mr. Carter: With that, if the Court pleases, that completes the presentation of the plaintiff's direct case on the corrupt bargain phase of this litigation.

The Court: The plaintiff rests?

Mr. Carter: Plaintiff rests.

The Court: Plaintiff rests, Mr. Updike?

Mr. Updike: Yes.

* * * * * * *

[fol. 1113] The Court: Now, the next issue presented by the plaintiff is whether this settlement should be set aside by reason of the failure of Kirby to adduce or cause to be adduced before the State Court or its referee facts material to an evaluation of Kirby's liability on claims arising out of the 1950 exchange transaction.

Now, that raises issues of fact and issues of law. It raises the issue of law as to what the liability of Mr. Kirby was to come forward with evidence before the referee.

I have read the supplemental memorandum of law which Mr. Updike handed me today. I may say that I am a little bit concerned because it does not meet this precise problem. The memorandum, Mr. Updike, goes into a great deal of [fol. 1114] discussion about the duty of a director to make

full and fair disclosure to his board of directors, to his stockholders and if called as a witness to make a full and fair disclosure.

Now, that is all Hornbook law. Certainly, in a self-dealing transaction a director owes the highest degree of fiduciary responsibility to his corporation, to his board, to his stockholders. I so held in some decisions I have written, and I think that is very well established law.

Now, that is a little different from this situation. May I say that the way it sizes up in my mind is this, that a director has the burden of being fair with his board, with his stockholders, and if called upon as a witness, to the Court. If he does not assume that burden, then he has failed in his burden of proof which he may have to justify a transaction, and many of the cases which you have cited are exactly that, that they say that the director did not meet his burden of proof of making a full and fair disclosure, and therefore he could not be exonerated from his liability. That would be certainly the situation if the referee had decided this way in Zenn v. Anzalone or the State Court had done so, but now we are in a different situation. There [fol. 1115] was a hearing before the referee. The referee rendered a report. The court approved the report. It was an adversary proceeding. Now there is this suit, a separate suit brought to set aside that decision of the State Supreme Court, and now the burden, it seems to me, is upon the plaintiff, not merely to say that Mr. Kirby did not perform his fiduciary duties to his stockholders or directors, which was the issue in Zenn v. Anzalone, but that Mr. Kirby had an affirmative duty, where he was being sued, to come forward in that proceeding and say, "Here is some evidence which will certainly convict me, and I want you to see that evidence which will certainly convict me."

Now, that is a little different situation, and I did not see in the memorandum of law that was presented any case which deals with that situation of the obligation in an adversary proceeding of that nature to set aside a settlement and decision which would require him to do that.

Now, there may be—and maybe you are asking me to tread new ground in this case; if so, I am quite ready to tread the new ground—but if there is any case on the point, I would be glad to have it.

Now, that is the issue of law that you have got.

[fol. 1116] Now, then, you have the issue of fact on this failure of Kirby to adduce, which is this: What are the things that he did not adduce, and were they material to the determination of the referee in the State Court?

This afternoon Mr. Updike has identified the particular exhibits which he says were not adduced by Mr. Kirby and should have been. There are 21 or 22 exhibits.

Now, essentially, it seems to me from the evidence—and I may be wrong, and I say this so you can correct me on argument if I am wrong—essentially the argument made by Mr. Updike is that the documents which were not produced by Mr. Kirby were documents which showed a projection of income for future years, that Mr. Kirby knew the officials of the company had anticipated certain earnings and had projected them, and essentially the documents not produced were those projections of income.

Now, if we assume that that is true, you have, of course, the question, one, did Mr. Kirby know about those things, which is an issue of fact; two, did the referee have before him sufficient data to show that the income had been projected or that there was anticipated this large increase [fol. 1117] in earnings of IDS; and three, if these documents which Mr. Updike says should have been submitted to the referee, were submitted, would it have made any material difference in the determination of the referee?

Now, those are some of the issues which we have got to decide on this failure to disclose, and I say them not as deciding them, but as pointing out the things that I would like to be enlightened on on the argument.

* * * * * * *

[fol. 1118] New York, April 18, 1963,
10:30 A.M.

* * * * * * *

CHARLES F. SMITH, called as a witness, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Whittlesey:

Q. Mr. Smith, are you connected with the firm of Joseph Froggatt & Co., Inc.?

A. Yes, sir.

Q. That firm has its main office at 74 Trinity Place, New York City?

A. Yes.

Q. Can you tell us what the nature of the business of [fol. 1119] Joseph Fraggott & Co. is?

A. It is largely accounting and auditing for insurance, restricted to insurance firms of all kinds, and also actuarial departments.

Q. How long have you been associated with Joseph Froggatt & Co., Inc.?

A. Slightly over 22 years.

Q. Are you an actuary?

A. Yes, I am chief actuary of the company.

Q. How long has the company been in business, do you know?

A. Its 50 anniversary was last month.

Q. In addition to its office in New York City, does it have offices in other cities in this country?

A. Yes, ten other offices.

Q. Would I be correct in stating that Joseph Froggatt & Co., Inc. is one of the largest actuarial firms in this country?

A. In general actuarial work, yes, not specifically in, say, pensions or as a single outfit.

Q. Mr. Smith, I will show you a letter with attached

schedules on the letterhead of Joseph Froggatt & Co., Inc. bearing date April 29, 1949, which is Plaintiff's Exhibit 220 for identification.

[fol. 1120] Mr. Updike: It is in evidence, Mr. Whittlesey.

Mr. Whittlesey: Excuse me, it is in evidence, yes.

Q. Do you have a copy of that with you?

A. Dated April 29, 1949?

Q. Yes.

A. Yes, I have that.

Q. Addressed, I believe, to the board of directors of Investors Diversified Services, Inc., is that correct?

A. Yes.

Q. Can you tell me generally what this letter and its supporting documents purport to be, just in general terms?

A. It is a development of the reserves required on outstanding certificates on various bases and also a development of the current operating results or, rather, an analysis of them projected for the various years.

Q. When you say "reserves on outstanding certificates," you mean certificates of IDS?

A. Yes, sir.

Q. Could you again describe briefly to the Court what you mean when you say certificates?

[fol. 1121] A. They are the commodity sold by Investors Syndicate in the nature of the purchase of mortgages, or the money, its shares in the mortgage portfolio.

Q. What were the certificates, actually? They are an obligation of IDS?

A. Yes, sir. They were accumulated toward a stated maturity value and they had various options, such as permission to leave the money in to be invested in interest or to cash them out under certain circumstances.

Q. In other words, they constituted a future obligation of the company payable at the end of a period of years?

A. Yes, sir, or at some specified occurrence.

Q. And subject to other variables, such as the right to cash the certificate in prior to maturity?

A. Yes, sir.

The Court: You also have an insurance feature?

The Witness: Both for death and disability, yes.

The Court: For the holder of the certificate?

The Witness: Yes.

The Court: That was really like a combined insurance policy plus a saving certificate?

[fol. 1122] The Witness: Yes, sir.

Q. Referring, Mr. Smith, to the first page of this report, and under the heading "valuation as at December 31, 1948," I call this language to your attention: "The valuation of the certificates in force as at December 31, 1948, produced the reserves shown in Schedule A."

Turning to Schedule A, and directing your attention to the next to the most right hand column on Schedule A, if you have that before you, we come to a figure, and it is under the heading "reserve at 4.535 per cent." We come to a figure of $250,926,000.

A. I am on the wrong page, then.

[fol. 1123] Q. I am looking at Schedule A attached to your document.

A. Oh, I see. Okay.

Q. A figure of $250,926,605.96; do you have that?

A. Yes, sir, I have it.

Q. And referring back to your language, that valuation of the certificates produced the reserves shown on Schedule A, would I be correct in understanding that the meaning of that statement, coupled with what appears on Schedule A, is that if the assets of the company produced an income return of 4.35 per cent the company would need to meet its certificate liabilities, this amount of 250 million?

The Court: 4.35 or 4.535?

Mr. Whittlesey: 4.535 per cent.

Q. (Continuing) Would need a reserve to meet its future certificate obligations of $250,926,605?

A. Yes, in so far as moneys paid in to date.

Mr. Updike: May I raise a question as to the materiality of this, as to whether this is material?

The Court: I am lost on it, but these are preliminary questions.

Mr. Whittlesey: These are preliminary.

[fol. 1124] Mr. Updike: If this goes into the merits of the transaction itself which we have understood we were not allowed to do, it seems to me it is not material.

The Court: I am not going into the merits of any transaction. These are preliminary questions.

I am glad to have an actuary tell me what he means by a lot of figures I cannot understand myself.

Mr. Whittlesey: Your Honor, I would say I would not have called this witness were it not for the fact that Mr. Updike put this in evidence, and I wish to have some explanation of just what it really shows.

The Court: All right.

Q. And again referring to the most right-hand column on Schedule A, where we have a final figure of $272,130,-584.23, under the heading Reserve at 3 Per Cent, that would mean the amount of reserve necessary to be set up if it were assumed that the company was earning 3 per cent on its assets in order to meet its forward liabilities?

A. That is correct. That plus expected future new moneys under the certificates themselves.

Q. And when you say "future moneys," you mean what [fol. 1125] we might call premium payments if we were talking of insurance.

A. Corresponding to premium payments, yes, sir.

Q. Going back to this Schedule A and that column headed reserve at 3 per cent per Joseph Froggatt & Company, Inc., what is the significance, if any, of that 3 per cent figure, do you know?

A. That, as I understand it, was the rate required for the computation of reserve liability under the SEC or Investment Act at the time.

Q. That was the Investment Act of 1940?

A. Yes, the Investment Act.

Q. Of course, the lower assumed rate of interest on the

assets of the company, the higher the amount of cash reserve would be required to be set aside to meet future liabilities.

A. That's right, yes.

Q. I see. All right.

Now, I direct your attention now to Schedule C of this same report, and that bears the heading Projected Net Income of Investors Syndicate before profit or loss on sales of investments or income taxes available for improving installment certificate reserves, including the company's [fol. 1126] portion of subsidiary companies' earnings before profit or loss on sale of investments or income taxes, and specifically I direct your attention to the figure under the column headed 1949, to the figure of $13,644,500, which is described as Net Investors Syndicate Income Before Profit or Loss on Sale of Investments or Income Taxes Available for Improving Installment Certificate Reserves, Including the Company's Portion of Subsidiary Companies' Earnings Before Profit or Loss on Sale of Investments or Income Taxes, and I would ask you whether that figure of $13,644,500 represents the projected net operating income of IDS, including its share of subsidiaries' earnings for the year 1949?

A. Yes, sir, prior to setting up reserves. It is the total operating income for the year.

Q. Exactly, net operating income.

A. Net; yes, sir.

Q. That phrase "available for improving installment certificate reserves," which qualifies this description of that figure, means what?

A. The amount set aside as the company's accrued liability under the certificates increases or changes at least from year to year as new money comes in and claims are [fol. 1127] paid out, and this would be available to set aside enough to bring the certificates into actuarial balance for that year.

Q. Well, in other words, if my understanding is correct, each year the company, in order to meet its forward maturities, must set aside a certain amount from its net operating income for that purpose?

A. That's correct; yes, sir.

Q. Depending on how you figure what the reserves should be, whether on a 3 per cent basis—

A. That is true.

Q. —4.535 per cent basis or some higher basis of income return?

A. Yes, sir.

Q. In other words, just as a company with a bond issue maturing in 20 years would be required to set aside out of its net operating income a certain amount every year towards that coming maturity?

A. It is very similar; yes, sir.

Q. May I ask you this question, then:

This figure of $13,644,500 represents the projected net operating income of the company, including share of subsidiaries' earnings before anything has been taken out and set aside that year towards these anticipated maturities?

[fol. 1128] A. That is correct; yes, sir.

Q. And this figure does not then represent the net income of the company available for declaration of the dividends?

A. No. That is entirely different. But may I qualify my previous answer just a bit?

Q. Yes.

A. That certain portions of these reserves have been set aside—

Q. Already.

A. —some $800,000, but not the basic ones toward maturity, just some special ones.

Q. And this figure here does not include what must be set aside in that year?

A. That's correct.

Q. Depending on how the company figures it should increase its reserves.

A. Right.

Q. And one could not, from this figure here of $13,644,500, from that figure alone determine how much of that projected net operating income would actually be available for dividend purposes, for example?

A. Not from that alone; no, sir.

[fol. 1129] Q. Or other purposes of the company.

A. No, sir.

Q. Other than setting aside certificate reserves.

A. It is merely an aggregate figure.

Q. Or to illustrate it another way, Mr. Smith, if the company in this year 1949 were to set aside or be required to set aside $13,000,000 for improving certificate reserves in that year, then the net income of the company available for other purposes would be $644,500, correct?

A. Yes, sir.

Q. Is there anything, may I ask you, in this report, Exhibit 220, from which anyone reading the report could determine how much of the net income of 13,644,500 projected for 1949 and similarly for the following years would be available for purposes of the company other than improving certificate reserves?

A. From this report alone; no, sir.

Q. No way of telling that?

A. No.

Mr. Whittlesey: I think those are all the questions I have, your Honor.

[fol. 1130] Cross examination.

By Mr. Updike:

* * * * * * *

[fol. 1131] I would like to reoffer Plaintiff's Exhibit 221, which is still marked for identification, as part of the information available.

The Court: What is 221?

[fol. 1132] Mr. Updike: 221 is the report of this company dated May 22, 1950.

The Court: Is that shown to have been given to Mr. Kirby?

Mr. Updike: No, it has not been shown to have been given to Mr. Kirby in any direct sense.

Mr. Whittlesey: In any sense.

Mr. Updike: Well, in the sense that it was available to Mr. Shipman at Alleghany, and he said he saw it. In that sense it was available to Mr. Kirby.

Mr. Whittlesey: I do not recall that Mr. Shipman ever identified this May 22, 1950 report as ever having been received by him.

The Court: What difference does it make on this thing anyway? You have got one problem, whether Mr. Kirby knew about it. What difference do these reports make?

* * * * * * *

[fol. 1133] Mr. Whittlesey: Will you stipulate, Mr. Updike, that this Exhibit 221, being this Froggatt report on the letterhead of Froggatt & Company, dated May 22, 1950, was found in the files of IDS as a result of our taking depositions out there under this Court's order?

[fol. 1134] Mr. Updike: Yes, sir, I do so stipulate.

Mr. Whittlesey: And that you make no claim that this report was at any time received or seen by Mr. Kirby?

Mr. Updike: Well, my claim with respect to it, as far as Mr. Kirby was concerned, is that this was something which he should have known about—I do not claim that he personally knew about it except through its accessibility either in Alleghany's files or in the files of IDS.

Mr. Whittlesey: Well, on that claim that he should have known about it, that is some time after May 22, 1950, but I gather you make no claim that he actually did know about it at all.

The Court: I think Mr. Updike has made that clear, Mr. Whittlesey. We will take it for what it is worth. I do not think it is worth very much as far as the claim against Mr. Kirby is concerned.

* * * * * * * *

[fol. 1135] New York, April 19, 1963,
10:30 A.M.

COLLOQUY BETWEEN COURT AND COUNSEL

* * * * * * *

[fol. 1136] Mr. Updike: Finally, sir, in the course of [fol. 1137] my examination of Mr. Purcell, he identified a letter in July 1954 from Mr. Waag, the controller of IDS, addressed to him, which contained three enclosures. Two of those three enclosures have been introduced by Mr. Whittlesey on the ground that they were before the referee in Zenn v. Anzalone. I therefore would like to introduce the covering letter, Exhibit 362 for identification, and Plaintiff's Exhibit 365 for identification which was part of it.

The Court: What is there to prove that Mr. Kirby knew about them?

Mr. Updike: There is no proof directly. There is evidence from Mr. Purcell that these went to Mr. Young who Mr. Kirby has testified was the source of his, Kirby's, information with respect to IDS affairs.

The Court: Is there any objection to their receipt?

Mr. Whittlesey: Yes, I object, your Honor.

The Court: Objection sustained, as not connected with Mr. Kirby.

* * * * * * *

[fol. 1138] The Court: * * * Mr. Updike, do you want to talk on the failure to disclose?

Mr. Updike: Would you like me to go first, sir?

The Court: Yes, I think so. The motion to dismiss has been made on that ground also.

* * * * * * *

[fol. 1139] The Court: You are saying that Mr. Kirby had an obligation to produce certain records before the referee. It seems to me a prerequisite to that is Mr. Kirby's knowing that those records existed. You cannot charge a man with the responsibility of not producing something

if there is no proof that he knew the thing existed. That is why I draw that line.

Mr. Updike: Would you say then, sir, that it depends on where Mr. Kirby keeps his files? For example, he kept rather elaborate files out in Morristown. That was his way of working and being the president of Alleghany. But if his files had been in Alleghany's own offices, it does not seem to me that that changes the situation.

The Court: Any proof that these came to his attention would be sufficient. But let me point this out, Mr. Kirby, as head of Alleghany Corporation, was charged with a lot of responsibilities. He was charged with the responsibility of, let us say, of control of IDS, which in turn controlled Investors Syndicate of Canada. Suppose a document existed up in the files of Investors Syndicate of Canada which indicated something, is Mr. Kirby charged with knowledge of that particular thing?

Mr. Updike: He is charged with knowledge of it if it [fol. 1140] has a material bearing on whether or not he should keep property in a self-dealing transaction. If he were being merely sued for negligence—

The Court: Even though he never saw it and never knew of it, but just because he was a corporate trustee supervising the subsidiaries, he is charged with responsibility for everything there?

Mr. Updike: I say to you, sir, he had the duty to inform himself or to try to find out from somebody else if there was anything there that had any bearing with respect to whether or not he should keep the property that he acquired in a self-dealing transaction.

The Court: That is certainly so if he were called upon to produce, but whether he had to go out and voluntarily go through all the Canadian offices and all the subsidiary offices, go through the file cabinets to see if he could find things himself, without anybody asking, it seems to me you put an awful burden on him.

Mr. Updike: Quite clearly this is not a duty that he had to do personally. He could have used Mr. Baugeard or any-

body he wanted to use. But in this situation, it seems to me it is quite clear up until at least the time when Mr. Kirby and Mr. Young and these others decided to approve the [fol. 1141] acquisition of Alleghany, Mr. Kirby was quite knowledgeable about this business, he was following it closely, and he expected to continue to follow it closely. One of the exhibits in this case, and there are a number of them that have not been dealt with at any length, but one of them is a letter from Mr. Kirby to Mr. Young, dated March 14, 1949, which Mr. Whittlesey put in yesterday.

He says on the first page, "If an affirmative conclusion in this matter," that is, the matter of the prospective acquisition of IDS, "appears to be a probability, I think we should agree on a working board and a full-time management structure of one or more executives in whom we have confidence. This thought is about the same as I expressed to you a year ago in connection with Central States. No matter who the top executives in Investors Syndicate now are, and they may be fully competent, I think we should have one or more executives of our own choosing in there to keep us fully informed from day to day."

Now, I am reading more into it with a backward look than Mr. Kirby intended when he used that phraseology "day to day." But to me it is quite clear that Mr. Kirby cannot do, as it seems to me he has done here, say, "I don't [fol. 1142] remember anything about these things," it is understandable that he might not remember specific contents of specific letters, but to say, as he did, "I left all of this to Mr. Young," or, "I left all of this to Mr. Young and Mr. Purcell"—

The Court: You know, Mr. Updike, I did not reject evidence on any such basis as that. If you tied it to Mr. Kirby irrespective of whether he said he knew it or not, it is in evidence. I just did not take Mr. Kirby's word for it.

Mr. Updike: That is quite true, I realize that.

[fol. 1143] The Court: It is where there was no evidence connecting him that I rejected it.

Mr. Updike: Your Honor hasn't gone as far with me as I was about to go in my argument a moment ago, and

that is to say in our view Mr. Kirby cannot by saying now that he left this to Robert Young or he left this to Mr. Purcell, he cannot, it seems to me, escape the consequences in a situation where he wants to hold on to property that he got from Alleghany's own securities portfolio.

Your Honor posed to me a hypothetical situation where I had Mr. Kirby chasing around in the remote provinces of Canada for material with respect to ISC. With respect to the plaintiff here concerned, the plaintiff urges you, sir, that Mr. Kirby's responsibility could be measured for this case only by going as far as the people who were with him on the Alleghany board. He had Mr. Purcell and Mr. Purcell was fully and intimately knowledgeable about IDS. Or he could turn to Mr. Anzalone who was similarly knowledgeable, who similarly received the report that Mr. Purcell freely acknowledged that he received with respect to IDS [fol. 1144] and its operations, and these are not reports which relate to the IDS situation before its acquisition. This is after it is an operating company and after the December 6 has rolled around, and after January and February and March have gone by, and these directors are about to receive stock at $8.15 a share in the circumstances disclosed by the evidence that we have brought forward in this case, and yet which was not before the referee at all.

I have a number of cases here, but your Honor, I am sure, is familiar with the general case law with respect to the inability of a director, especially in a self-dealing case, to shunt off to another or to absolve himself from responsibility by indicating that he somehow delegated the performance of his fiduciary duty on to someone else.

The Court: You don't have to argue that.

* * * * * * *

[fol. 1145] Mr. Kissam: Your Honor, I wonder if we could ask, through you, in view of Mr. Updike's presentation, he is bringing in, at least indirectly, that various documents which he says Mr. Kirby should be charged with, were in the hands of Mr. Young, Purcell and Mr. Anzalone.

He has not give you any explanation as to why none of these people are involved in this action. I do not know whether you care to ask him or whether he cares to answer.

The Court: Well, I did not notice anything about Mr. Anzalone. I noticed that one. How is Mr. Anzalone tied [fol. 1146] into this case?

Mr. Updike: It is only because the evidence shows that Mr. Anzalone and Mr. Purcell were out in Cleveland. They had their office in Cleveland for Alleghany together, and the evidence also shows that Mr. Anzalone, because he was a director of IDS along with Purcell, received the same documentation at the Alleghany offices in Cleveland.

The Court: So you say because X in Cleveland received some documents there that Mr. Kirby, K in Morristown, is chargeable with knowledge of them?

Mr. Updike: Well, now, the physical location of this, sir—

The Court: Is that what you are trying to say?

Mr. Updike: No, that is not what I am trying to say. I am saying that Mr. Kirby, who urged Mr. Young to put the Alleghany management into IDS so they would be kept abreast of things day by day, they put Mr. Purcell, and they put Mr. Anzalone on to the IDS board. This was in fulfillment of what Mr. Kirby wanted to do and—

The Court: I understand that.

Mr. Updike: Mr. Kirby, all he had do was snap his fingers and Mr. Anzalone would have brought all the docu- [fol. 1147] ments from Cleveland in no time at all. I think that is a fair inference.

The Court: That is probably true, but is he charged now with knowledge of some documents that he never did see, that he should have given those to the referee although he never did see them?

Mr. Updike: He is charged with the knowledge of the documents that he would have known of.

The Court: That were in the possession of Mr. Anzalone if he had gone out to Cleveland and looked at them.

Mr. Uplike: No, he is chargeable with knowledge of the documents that he would have known about had he been an active director and president of Alleghany Corporation, and he cannot by being inactive or by tendering his job over to Mr. Young escape liability in connection with a self-dealing transaction where he took stock from Alleghany's portfolio.

The Court: I think I have your point.

We will hear from Mr. Whittlesey.

Mr. Kissam: That wasn't my question. My question is, Mr. Anzalone, Mr. Purcell and Mr. Young were all parties to the settlement which he is attacking. Now he has demonstrated that all of those three gentlemen, according to [fol. 1148] his theory, had documents that he wants to charge Mr. Kirby with. I am curious why he has not got them in the action.

The Court: Well, that is a matter of his tactics, I guess.

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IN THE UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT No. 1

(See opposite) ☞

[fol. 1149]

1689-
1830

Supreme Court of the State of New York

COUNTY OF NEW YORK

SADIE ZENN, FREDA BLUMENTHAL, HENRY MENCHER, ABRAHAM L. FISTEL, JEANETTE ANNENBERG, BERNARD LIEBERMAN, NICHOLAS SCHEPIS, JACOB HAIMOWITZ and FRANCES KOENIG,

Plaintiffs,

against

J. J. ANZALONE, FRANK B. BATEMAN, O. HENRY BRIGGS, THOMAS J. DEEGAN, JR., WALTER W. FOSKETT, HENRY J. GUILD, ALLAN P. KIRBY, CLINT W. MURCHISON, HERMAN R. NEES, BROOKS POTTER, R. W. PURCELL, SIDNEY W. RICHARDSON, RADCLIFFE SWINNERTON, ANDREW VAN PELT, ROBERT R. YOUNG,

CLINT W. MURCHISON, JR. and JOHN D. MURCHISON, individually and as partners, doing business under the firm name and style of MURCHISON BROTHERS,

CHESAPEAKE INDUSTRIES, INC., NEW YORK CENTRAL RAILROAD COMPANY and ALLEGHANY CORPORATION,

Defendants.

Index No. 7244 1954

CONSOLIDATED AMENDED COMPLAINT

Plaintiffs, for their consolidated amended complaint, allege upon information and belief, except that each plaintiff alleges upon knowledge the matters set forth in paragraph "1" so far as they concern himself or herself:

FIRST CAUSE OF ACTION

1. (a) The plaintiffs hereinafter named are the owners and holders of shares of the common stock of defendant Alleghany Corporation ("Alleghany" hereinafter) in the amounts, and they have been stockholders of Alleghany since the times, hereinafter set forth opposite their respective names:

Plaintiff	*Number of Shares Held*	*Time of Becoming a Stockholder*
Sadie Zenn	500	1951
Freda Blumenthal	1500	Prior to 1945
Abraham L. Fistel	500	Prior to 1945
Jeanette Annenberg	200	Prior to 1945
Bernard Lieberman	500	1945
Nicholas Schepis	100	1946
Jacob Haimowitz	10	1951
Frances Koenig	30	1945

(b) Plaintiff Henry Mencher is the owner and holder of ten shares of the 5½% Series A cumulative preferred stock of Alleghany and has been a stockholder of Alleghany since 1948.

(c) Plaintiffs bring this action derivatively and representatively on behalf of Alleghany and its Common and Series A preferred stockholders.

2. (a) Defendant Alleghany is a corporation organized under the laws of Maryland.

(b) Defendant Chesapeake Industries, Inc. is a corporation organized under the laws of Delaware.

(c) Defendant New York Central Railroad Company is a railroad corporation organized under the laws of New York and of other states.

(d) Defendants Clint W. Murchison, Jr. and John D. Murchison are brothers. They were partners at times herein mentioned and now are co-partners doing business under the firm name and style of Murchison Brothers. The defendant Clint W. Murchison is their father. Said defendants are hereinafter sometimes referred to as the "Murchison Defendants".

3. Alleghany's business at all times herein mentioned and now does consist primarily of the investment and reinvestment of its funds in the securities of other corporations.

4. (a) In or about May 1947, defendants Young and Kirby acquired about 42% of Alleghany's voting stock and they thereupon became, and have since remained respectively, the chairman of the board and the president of Alleghany. The other voting shares of Alleghany, listed and actively traded on the New York Stock Exchange, a national securities exchange, were and are scattered among a large number of stockholders. By virtue of the premises, defendants Young and Kirby had at all times herein mentioned and now do dominate Alleghany's board of directors and determine the conduct of its business, policies and affairs, including the transactions hereinafter alleged.

(b) The members of Alleghany's board of directors from 1946 to date, their times of service and the offices held by them are set forth in Exhibit "A" annexed hereto.

5. In 1949 and 1950, at the time of the transactions hereinafter alleged, the defendants Young, Kirby, Bateman, Briggs, Foskett, Kirby, Noff, Potter, Purcell, Van Fleet and Young constituted the board of directors of Alleghany. The transactions hereinafter alleged were caused by said persons pursuant to a conspiracy among them. The object of the conspiracy was to enable defendants Young and Kirby to enrich themselves at the expense of Alleghany.

6. (a) In or about April and May, 1949, Alleghany acquired 104,961 shares or [illegible] of the outstanding common stock of a Minnesota corporation known as Investors Diversified Services, Inc. ("IDS" hereinafter) [illegible] per share.

(b) In or about [illegible] Alleghany acquired 48,225.61 shares or more than [illegible] outstanding Class A common stock of IDS at an average cost of $[illegible] per share.

(c) Each share of IDS common stock is entitled to one vote per share; the Class A stock of IDS is non-voting. In all other respects both classes of stock have equal rights.

[fol. 1151]

(d) Both classes of HDS stock were and are traded over the counter.

7. On or about December 6, 1949 Alleghany's board of directors resolved to permit Alleghany's officers to exchange preferred stock of Alleghany-held by them for the HDS Class A stock held by Alleghany. In connection with such exchange, the preferred stock of Alleghany was to be valued at its market price; the HDS Class A stock was to be valued at its market price or at its cost to Alleghany, whichever would be higher. Such market prices were to be determined as of the final exchange date. The exchange was to be conditional upon ratification by Alleghany's common stockholders at their annual meeting on May 3, 1950.

8. (a) On January 20, 1950 Alleghany accepted a tender by defendant Young of 2,420 shares of Alleghany's preferred stock, Series A, at $81 per share in exchange for 24,063 HDS Class A shares, at $8.1453 per share, plus $19.65 in cash.

(b) On the same day Alleghany accepted a tender by defendant Kirby of 2,420 shares of Alleghany's preferred stock, Series A, at $81 per share, in exchange for 24,062 HDS Class A shares, at $8.147 per share, plus $27.79 in cash.

(c) Defendants Young and Kirby made [illegible] Alleghany accepted them, pursuant to the aforesaid [illegible] of December 6, 1949 and subject to [illegible] Alleghany's common stockholders.

9. (a) In order to obtain the [illegible] Alleghany mailed to its common stockholders [illegible] ing and proxy statement dated April [illegible] hereinafter).

(b) The proxy statement notified the stockholders that the annual meeting of May 3, 1950 would be held for the purpose, among others, of ratifying or rejecting the aforesaid exchange. It set forth the text of the directors' resolution of December 6, 1949, the times and the cost at which Alleghany had acquired its holdings of HDS stock. It described the legal incidents of the two classes of HDS stock. It stated that the market price of the HDS Class A stock on March 31, 1950 was $9 bid, $9.75 asked per share, and that the market price of Alleghany's preferred stock, Series A, on said date was $70 per share. It stated that the transaction was advantageous to Alleghany; and it requested the common stockholders to approve it by voting in its favor or executing management proxies.

(c) Pertinent portions of the text of the proxy statement, including the text of the directors' resolution of December 6, 1949, are annexed hereto as Exhibit "B".

10. At their annual meeting of May 3, 1950, Alleghany's common stockholders purportedly adopted a resolution approving the aforesaid exchange.

11. (a) On or about May 15, 1950 Alleghany and defendant Kirby purportedly consummated the aforesaid transaction by the exchange of 2,420 shares of Alleghany's preferred stock, Series A, for 24,062

IDS Class A shares, and a cash payment by Alleghany to defendant Kirby of $27.79.

(b) On May 15, 1950 the market value of Alleghany's preferred stock, Series A, was $68 per share, and the market value of the IDS Class A stock was $13 per share.

(c) Accordingly, the consideration which Alleghany received from defendant Kirby fell short of the amount required by the directors' resolution of December 6, 1949 by the sum of $148,273.79.

12. (a) On or about May 23, 1950 Alleghany and defendant Young purportedly consummated the aforesaid transaction by the exchange of 2,481 shares of Alleghany's preferred stock, Series A, for 24,083 IDS Class A shares, and a cash payment by Alleghany to defendant Young of $19.65.

(b) On May 23, 1950 the market value of Alleghany's preferred stock, Series A, was $70.50 per share, and the market value of the IDS Class A stock was $13 per share.

(c) Accordingly, the consideration which Alleghany received from defendant Young fell short of the amount required by the directors' resolution of December 6, 1949 by the sum of $142,228.65.

13. (a) By reason of the premises, the aforesaid exchange transactions should be rescinded or, in the alternative, the individual defendants should be required to account to Alleghany for the aforesaid shortage of the exchange price.

(b) The aforesaid exchange transactions should also be rescinded for the additional reasons set forth in paragraphs "14" and "15".

14. The notice of annual meeting and proxy statement of April [illegible], 1950, as supplemented by a further statement mailed by Alleghany to its stockholders on or about April 26, 1950, to the knowledge of the individual defendants, contained statements which, at the time and in the light of the circumstances under which they were made, were false and misleading with respect to material facts and omitted to state material facts necessary to make the statements therein not false or misleading, as follows:

a) During the latter part of the year 1949 and the early part of the year 1950, the earnings of IDS had taken a spectacular upturn. Whereas IDS had sustained a loss of $384,597 ($1.32 per share) in 1948, and a loss of $79,087 ($.27 per share) during the first half of the year 1949, it realized net earnings of $481,093 ($1.65 per share) during the second half of the year 1949, and net earnings of $831,217 ($2.17 per share) during the first three months of the year 1950 ran, on an annual basis, $8.68 per share, or more than the entire price paid by defendants Young and Kirby. These earnings developments were neither revealed in the proxy statement nor otherwise published.

(b) This improvement in the earnings of IDS reflected a trend of favorable developments which was foreseeable to and foreseen by the individual defendants. The net earnings of IDS for the first half of the year 1950 amounted to $2,341,887; and its net [illegible] for the entire year 1950 amounted to $4,036,745 (exclu

...ase of UDS proportionate ... and ... of the subsidiaries in the ... 1950 net earnings of UDS ... Alleghany received for ... UDS ... average price equivalent to ... per ...

(c) This earning trend was ... increase of the market value of the UDS ... foreseeable to and foreseen by the individual defendants. ... the sales price set forth in the proxy statement was $... per share, the market price rose to $... by the end of ... 1950 to $... by the end of 1951, to $... by the end of 1952 to $... by the end of 1953, to about $... by May 1954 and to about $... at this time.

15. (a) The proxy statement, notice of meeting and ... letter of April 26, 1950, violated ... Act of 1934 and Rule X-14A-9 of the Securities and Exchange Commission.

(b) The majority of the votes at the stockholders' ... May 3, 1950 was cast by means of management proxies ... through the proxy statement.

(c) A majority of the stockholders' votes cast at the ... May 3, 1950 was void.

(d) The stockholders' resolution purportedly approving the ... and exchange transactions was void.

(e) Since the aforesaid exchange transactions were, by their terms, subject to stockholders' approval, they are likewise void.

16. Demand on the board of directors of Alleghany to bring ... action would be futile because:

(a) The present board of directors of Alleghany ... the defendants Briggs, Deegan, ... Pelt and Young.

(b) A majority of ... actions complained of.

(c) The directors ... dominated and controlled by defendants Young and Kirby.

(d) The institution of this action by the directors would place it in hostile hands and would prevent its effective prosecution.

17. Plaintiffs have no adequate remedy at law.

SECOND CAUSE OF ACTION

18. Plaintiffs reallege paragraphs "1" to "4" and "6".

19. During all or part of the time from December 1951 to ... defendants Anzalone, Briggs, Deegan, Foskett, Gudd, Kirby, Neff, Van Pelt and Young constituted the entire board of directors of Alleghany. The transactions hereinafter alleged were caused by said defendants pursuant to a conspiracy among them. Defendant Richardson and the Murchison defendants joined in the conspiracy. The

object of the conspiracy was to enable said defendants to enrich themselves at Alleghany's expense by various means in the acquisition of control of The New York Central Railroad Company (the "New York Central" hereinafter) through the use of the resources and facilities of Alleghany. The cooperation of the Murchison defendants was to be obtained by causing Alleghany to sell them the voting control of IDS at a price far below its value. Alleghany was to finance and otherwise to facilitate the acquisition of large amounts of New York Central's stock by the Murchison defendants and defendants Young, Kirby and Richardson. The aforesaid individual defendants engaged in the acts and conduct hereinafter alleged, and caused Alleghany to participate therein, pursuant to such conspiracy.

20. (a) For many years defendants Young and Kirby had aspired and attempted to assume the management and to become members of the board of directors of the New York Central.

(b) The New York Central is a railroad company organized in New York and other states. It owns, directly and through subsidiaries, the second largest railroad system in this country. Its authorized capital stock consists of 10,000,000 shares of no par value common stock, of which 6,447,410 shares are issued and outstanding and entitled to vote. Such shares, listed and actively traded on the New York Stock Exchange, are scattered among many thousands of stockholders.

21. (a) In January and February 1954, and for some previous time, the largest block of New York Central stock, amounting to 800,000 shares, or about 12.4% of the total shares outstanding, was held by The Chesapeake & Ohio Railway Company (the "C. & O." hereinafter), a railroad company organized under the laws of Virginia and West Virginia.

(b) For many years and until January 19, 1954, Alleghany owned substantial amounts of the voting stock of the C. & O., constituting working control. During such times, defendants Young and Kirby were directors of the C. & O., defendant Young being the chairman of the board. Other directors of Alleghany (defendants Ansalone, Guild and Van Pelt) were likewise directors or officers of the C. & O.

(c) Defendant Eaton, a friend of defendants Young and Kirby, was likewise a director of the C. & O.

22. The aforesaid attempts of defendants Young and Kirby to assume the management and to become members of the board of directors of the New York Central had failed because:

(a) Under the Interstate Commerce Act and orders of the Interstate Commerce Commission, their and Alleghany's connection with the C. & O. rendered them ineligible for directorships or other managerial positions with the New York Central; and

(b) The C. & O. was unable to vote its 800,000 shares in the New York Central because, under orders of the Interstate Commerce Commission, these shares, while owned by the C. & O., had to be and were placed in a voting trust with The Chase National Bank of the City of New York, the power to vote such shares being vested exclusively in said bank. The voting trust was to end upon the transfer of the shares to any party not affiliated with the C. & O.

23. In order to make themselves eligible for directorships and managerial positions with the New York Central, defendants Young and Kirby, in concert with the other directors of Alleghany and with defendant Eaton, caused the following things to be done:

(a) On or about January 19, 1954, Alleghany sold its entire holdings (104,854 shares) of C. & O. common stock to defendant Eaton at the price of $34.20 per share, or an aggregate of $3,595,118.

(b) At or about the same time, defendants Young, Kirby, Gould and Van Pelt resigned their positions with the C. & O., defendant Anzalone resigned his position with Alleghany and they assisted in the appointment of defendant Eaton as the new chairman of the board of the C. & O. and the appointment of Eaton's nominees to the board of directors of the C. & O.

24. The sale by Alleghany of its aforesaid block of C. & O. stock constituted a waste of Alleghany's assets because:

(a) The C. & O.'s common stock had earned and paid its dividend during the darkest days of the early thirties in 1932 and 1933 its annual common stock dividend amounted to $3 per share. It had a consistent record of high earnings which, in 1953, had risen to an all time peak of $6.04 per common share. The C. & O. was in the finest physical condition ever attained in its history.

(b) The fair value of the aforesaid block of C. & O. stock carrying control of the C. & O. was substantially in excess of the price received therefor by Alleghany.

(c) Alleghany had no business reasons for selling the block of C. & O. stock, such sale being only to effectuate the interests of defendants Young and Kirby.

25. Having thus separated their connections with the C. & O., defendants Young and Kirby requested the New York Central's board of directors to elect them as members of that board. The board of directors of the New York Central rejected that request on or about February 19, 1954.

26. (a) Defendants Young and Kirby thereupon publicly announced that, at the forthcoming annual meeting of stockholders of the New York Central to be held May 26, 1954, they would seek the election of a new board of directors consisting of themselves and of a slate of candidates to be designated by them.

(b) The management of the New York Central publicly announced that it would resist this plan and seek the re-election of the incumbent board of directors.

(c) Both sides indicated that they would seek to acquire stock of the New York Central and that they would solicit the votes or proxies of the stockholders of the New York Central for the contest at the forthcoming annual meeting.

27. Defendants Young and Kirby had anticipated these developments, including the forthcoming proxy contest with the management of the New York Central, as early as December, 1953. In order to

enlist the assistance of the Murchison defendants and the defendant Richardson—all of them possessed of great wealth—in the proxy contest, defendants Young and Kirby caused Alleghany to enter into the following transaction with the Murchison defendants. In the latter part of December 1953 Alleghany sold to defendant Murchison Brothers 27,500 common shares and 5,650 Class A shares of IDS at $125 per share, an aggregate of $4,143,750, represented by 4% promissory notes of Murchison Brothers payable over a period of five years. At said time the capitalization of IDS consisted of 1143818 shares of common stock (each of which shares was entitled to one vote) and of 175,836.37 shares of non-voting Class A common stock. Immediately before such sale, Alleghany owned 107,539.5 shares (about 93.5%) of the outstanding common voting stock of IDS. The sales price of $125 per share was inadequate inasmuch as the net earnings of IDS had risen from $1.46, $2.85 and $3.26 per share, respectively, for the first three quarters of 1953, to $10.72 per share for the last quarter of 1953; the consolidated net earnings of IDS for the year 1953 amounted to $27.20 per share; a substantial further rise in the earnings of IDS was foreseeable and was foreseen by the individual defendants; a further enhancement of value was foreseeable and was foreseen by the individual defendants, inasmuch as a five-to-one split of the IDS stock was then being planned and was thereafter actually carried out effective April 20, 1954. Within about four months of the sale, the market value of the IDS stock rose to about $280 per share; and it has risen to about $400 per share at this time. Alleghany had no business reason for selling a substantial portion of its control block of IDS stock or for committing a substantial part of its funds to a long-term personal loan to Murchison Brothers at a return of 4% annually; such sale and commitment were contrary to Alleghany's interest and policy, as was known to the aforesaid individual defendants.

28. In or about December 1953 and January 1954, defendants Young and Kirby anticipated that the forthcoming proxy contest with the management of the New York Central would cause a substantial increase in the market price of the common stock of the New York Central. Accordingly, in or about December 1953 and January 1954, defendants Young and Kirby each acquired about 100,000 shares of the common stock of the New York Central. Said defendants did not, however, permit Alleghany to buy at said time more than about 11,000 common shares of the New York Central. Upon the public disclosure of the impending proxy fight, the market price of the New York Central's common stock rose from a low of about 18½ to a high of 26 on February 15, 1954; its present market price is about 45.

29. (a) The aforesaid 800,000 share block of New York Central stock owned by the C & O was one of the most important factors in the forthcoming voting contest.

(b) Defendants Young and Kirby desired to assure themselves of the votes to be cast by said block.

(c) They conceived the plan of causing defendants Clint W. Murchison and Richardson, who had been close friends and business associates of Young and Kirby for several years, to acquire such stock, and of facilitating such acquisition by causing Alleghany to provide

[fol. 1157]

a substantial part of the necessary financing and a guaranty to Clint W. Murchison and Richardson against possible loss.

30. At the instigation of defendants Young and Kirby, and on or about February 23, 1954, defendants Clint W. Murchison and Richardson agreed to buy, and the C. & O. agreed to sell, the C. & O.'s aforesaid 500,000 shares of New York Central stock at the price of $25 per share, or an aggregate price of $20,000,000; and such agreement of purchase and sale was consummated a few days later.

31. At or about the same time, and in order to induce defendants Clint W. Murchison and Richardson to make such purchase, defendants Young and Kirby caused Alleghany to enter into an agreement or agreements with defendants Clint W. Murchison and Richardson which provided in substance:

(a) Alleghany was to loan the sum of $5,000,000 to defendant Clint W. Murchison and the sum of $2,500,000 to defendant Richardson. The loans were to bear 4% interest per annum and were to be repaid September 15, 1954.

(b) From July 15 to September 15, 1954, defendants Clint W. Murchison and Richardson were to have the option of selling all or part of 400,000 shares of New York Central's common stock to Alleghany at $25 per share. Upon the exercise of the options concerning all or part of 200,000 shares, Alleghany, Murchison and Richardson were to enter into certain joint venture agreements.

32. These loans, aggregating $7,500,000, were actually granted by Alleghany on or about March 15, 1954. At or about the same time Alleghany procured additional bank loans of $7,500,000 to the Murchison defendants and to defendant Richardson; and defendant Kirby granted them an additional loan of $5,000,000.

33. In connection with these transactions, defendants Young and Kirby had an understanding with defendants Clint W. Murchison and Richardson that the latter would vote the New York Central stock acquired by them in favor of defendants Young and Kirby and their proposed slate of directors. Alleghany, in turn, was to and did assist defendants Murchison and Richardson in procuring additional financing for their purchases of New York Central stock.

34. The aforesaid transactions were of great benefit and advantage to defendants Young and Kirby, but detrimental to and against the best interests of Alleghany because:

(a) Alleghany had no business reason for committing $7,500,000 of its funds to a six-month loan to defendants Clint W. Murchison and Richardson.

(b) Said sum could have been used more profitably and advantageously in the ordinary business of Alleghany.

(c) Alleghany had no business reason for granting defendants Clint W. Murchison and Richardson the above mentioned options.

(c) The option price of $25 per share was wasteful and substantially in excess of the then prevailing market price of the New York Central stock.

(e) The value of the above-said options was substantially in excess of $1,000,000. Alleghany granted the options without consideration and solely in the interest of defendants Young and Kirby.

35. During the first half of the year 1954 Alleghany incurred expenses aggregating more than $1,521,775 to defray the costs of a proxy fight with the then management of the New York Central as a result of which such management was dislodged and defendants Young, Kirby, Richardson and Clint W. Murchison were elected as directors of the New York Central on or about May 26, 1954.

36. On or about July 15, 1954 Alleghany bought 300,000 common shares of New York Central from the Murchison defendants and from defendant Richardson at $25 per share, a total of $7,500,000. Alleghany placed said 300,000 shares into joint ventures with defendants Murchison Brothers and Richardson, to which said defendants likewise contributed 300,000 shares of New York Central; the profits and losses of such joint ventures were to be equally divided between Alleghany on one hand and Murchison Brothers and Richardson on the other hand. At the same time Alleghany granted defendants Murchison Brothers and Richardson long term loans aggregating $7,500,000. At the same time defendant Kirby bought 300,000 common shares of New York Central from defendant Richardson at $25 per share, an aggregate of $7,500,000.

37. In or about December 1954 Alleghany secured from defendant Murchison Brothers options to buy an aggregate of 135,000 common shares of New York Central, at the price of $25 per share for 45,000 shares, $30 per share for an additional 45,000 shares, and $35 per share for the remaining 45,000 shares. Alleghany has since exercised such options. Defendant Murchison Brothers derived therefrom a profit aggregating $675,000.

38. In or about December 1954 Alleghany sold 45,000 common voting shares of IDS to defendant Murchison Brothers for $2,981,250 and agreed to sell to said defendant in 1955 an additional 55,000 common voting shares of IDS for $4,508,250, and agreed to transfer 130,000 common voting shares of IDS to Murchison Brothers in exchange for 130,000 non voting Class A shares of IDS. Thereafter, on or before April 1955, the parties to the aforesaid agreement changed its terms and carried it out, as modified, as follows. Instead of selling 55,000 shares and exchanging 130,000 shares of the common voting stock of IDS, Alleghany did transfer 212,000 common voting shares of IDS to defendant Murchison Brothers and received in exchange therefor 212,000 non voting Class A shares of IDS. By reason of the transaction [illegible] and paragraph 27 alleged, voting control of IDS [illegible] Alleghany to defendant Murchison Brothers for a consideration inadequate to reflect the true value of such control [illegible] of IDS stock.

[fol. 1159]

39. By reason of the premises, Alleghany sustained damages losses and the aforesaid individual defendants derived profits [illegible] The amounts of such losses and profits [illegible] the individual defendants [illegible] to plaintiffs.

40. Demand upon the board of directors of Alleghany to bring this action would be futile because:

(a) All directors of Alleghany have participated in the transactions complained of;

(b) They are dominated and controlled by defendant Young and Kirby;

(c) The institution of this action by the directors would place it in hostile hands and would prevent [illegible]

41. Plaintiffs have no adequate remedy at law.

THIRD CAUSE OF ACTION

42. Plaintiffs reallege paragraphs [illegible]

43. Alleghany was at all times since January [illegible] is an investment company as defined by [illegible] Act of 1940. It had during all such times and now has outstanding various securities issued by it, including its $1 par value common stock (4,637,797 shares), its 5½% Series A preferred stock [illegible] and its $4 prior preferred convertible stock [illegible] Alleghany did during all such times and now does engage primarily in the business of investing, reinvesting and trading in securities and did and does own investment securities with more than [illegible] of its total assets (exclusive of Government securities and [illegible] on an unconsolidated basis. Such business of Alleghany [illegible] constitute interstate commerce.

44. From November 1940 to October 1945 Alleghany [illegible] tered as an investment company with the Securities and Exchange Commission (the "S.E.C." hereinafter). By an order of [illegible] the Interstate Commerce Commission the [illegible] authorized Alleghany to acquire control of the C. & O. and [illegible] that, until further order, Alleghany was to be [illegible] subject to §§ 20 and 20a of the Interstate Commerce Act [illegible] extent as the C. & O. and its subsidiaries. Since [illegible] Investment Company Act provides that any company subject to regulation under the Interstate Commerce Act shall not be deemed an investment company, the S.E.C. ruled by order of October 4, 1945 that Alleghany had ceased to be an investment company within the purview of the Investment Company Act and terminated Alleghany's registration under said Act.

45. As part of the conspiracy alleged in [illegible] aforesaid individual defendants agreed that Alleghany [illegible] from registering with the S.E.C. under the Investment Company Act and from otherwise complying with the provisions of said Act. Such registration and compliance would have prevented Alleghany from playing its part in the consummation of the conspiracy.

46. Each of the transactions alleged in this cause of action was carried out by use of the mails and other means and instrumentalities of interstate commerce.

47. On or about January 19, 1954, by disposing of all its holdings of stock in the C. & O., Alleghany ceased to be a carrier and to control any carrier and it ceased to be subject to any of the provisions of the Interstate Commerce Act.

48. From January 1954 to date Alleghany has refrained from registering with the S.E.C. as an investment company and from taking any steps which would restore it to control by the N.E.C. On the contrary, it took numerous steps to create the appearance that it was a carrier subject to regulation under the Interstate Commerce Act and, as such, exempt from S.E.C. supervision and registration under the Investment Company Act. As part of such steps Alleghany sold most or all of the non railroad securities in its portfolio with the result that it lost substantial earnings and profits derivable from such securities.

49. On January 19, 1954 Alleghany, having disposed of its control of, and interest in, the C. & O., ceased to be a carrier and became and has since remained an investment company within the purview of § 3 of the Investment Company Act, subject to S.E.C. supervision and registration under said Act. By reason thereof the I.C.C. order of June 3, 1945 and the S.E.C. order of October 4, 1945, referred to in paragraph 48, expired on January 19, 1954 and have at all times since remained inoperative. By reason of the premises, the individual defendants, the New York Central and IBS became on January 19, 1954 and have since remained "affiliated persons" of Alleghany or IBS or both as defined in § 2(2) and (3) of the Investment Company Act.

50. By reason of the premises the individual defendants should have caused and should cause Alleghany to register with the S.E.C. under the Investment Company Act and otherwise to comply with the provisions of that Act. The individual defendants, with knowledge or notice of such duty, did and do refrain from complying with it in order to withhold the benefits of S.E.C. supervision from Alleghany and its stockholders, contrary to the requirements of the Investment Company Act and contrary to their obligations as fiduciaries of Alleghany.

51. The acts, omissions and transactions hereinbefore alleged were in violation of §§ 7(a), 17(a) and 21(b) of the Investment Company Act and contrary to the fiduciary duties which the individual defendants owed Alleghany and its stockholders. Such acts and transactions are void pursuant to § 47(b) of said Act. The individual defendants participated in said acts, omissions and transactions with knowledge of the facts hereinbefore alleged. By reason of the premises the individual defendants are jointly and severally liable to Alleghany for its damages and their profits resulting from said acts, omissions and transactions.

[illegible] paragraphs 40 and 41 [illegible]

and became parties thereto and to the carrying out thereof, as the nominees, agents and alter egos of Young and Kirby, and in complete subservience to their wishes and decisions, and they acted as aforesaid with full and complete knowledge of, with notice of, or on inquiry as to, the facts herein set forth, the rights and obligations of the parties in the premises, and the wrongful character of the transactions to which they were a party. By reason of the premises, the Murchison defendants and Richardson are subject to the same fiduciary duties, obligations and liabilities with respect to the stock of New York Central acquired and transferred by them as hereinafter set forth as are Kirby and Young, as if the Murchison defendants and Richardson had been controlling directors and principal stockholders of Alleghany.

65. Pursuant to said plan and agreement, Kirby and Young did cause and direct C. & O., in exercise of the condition and understanding upon which Cyrus Eaton was enabled to acquire Alleghany's stock interest in C. & O., to dispose of C. & O.'s 500,000 shares of New York Central stock by the sale thereof, at $25 per share, to Kirby's and Young's favored friends and associates, the Murchison defendants and Richardson, in whose names said 500,000 shares were purchased for $20,000,000, of which $5,000,000 was supplied by Kirby and Young and $15,000,000 was supplied directly and indirectly by Alleghany. Thereupon, the Murchison defendants and Richardson held such stock in equity impressed with a trust for the benefit of Alleghany, and it was their duty to transfer said stock [illegible] to Alleghany at cost, for its sole benefit, and to account for any dividends, income, gains and profits gained by them, Kirby and Young therefrom.

66. Pursuant to said plan and agreement Kirby and Young did cause and direct the Murchison defendants and Richardson to, and the Murchison defendants and Richardson did, transfer 200,000 shares of said 500,000 shares of New York Central stock so acquired, to Kirby and Young, in consideration of the $5,000,000 supplied by Kirby and Young, who now held said 200,000 shares in equity impressed with a trust for the benefit of Alleghany, subject to their obligation to account for any income dividends, gains and profits gained by them, the Murchison defendants and Richardson.

67. Pursuant to said plan and agreement Kirby and Young did cause and direct the Murchison defendants and Richardson to, and the Murchison defendants and Richardson did, transfer the remaining 600,000 shares of New York Central stock which were then held by the Murchison defendants and Richardson impressed with a trust for Alleghany as hereinabove alleged to Alleghany under a wrongful and illegal arrangement designated as a joint venture agreement which Kirby and Young wrongfully and illegally caused Alleghany, Richardson and the Murchison defendants to enter into, whereby instead of said 600,000 shares being transferred to Alleghany for its sole benefit, at cost and without profit or gain, Alleghany was to pay or advance the full cost thereof, and the Murchison defendants and Richardson were to retain the beneficial ownership of and all income gains and profits from 300,000 shares thereof, subject to the pledge of said 300,000 shares with Alleghany to secure their promissory notes for $7,500,000 representing that amount supplied by Alleghany for the cost of said 300,000 shares so payable at the termination of the joint

venture. No real or valuable consideration or thing whatsoever was ever paid to Alleghany by the Murchison defendants and Richardson for said alleged one-half participation in said 600,000 shares of New York Central stock. By reason of the premises, said joint venture agreement is illegal, invalid, ultra vires, void and of no legal effect in granting to the Murchison defendants and Richardson any legal or beneficial ownership or right, title or interest in and to any part of said 600,000 shares alleged to have been so joint-ventured, and the Murchison defendants and Richardson hold said pretended one-half interest in said 600,000 shares in equity impressed with a trust for the benefit of Alleghany, subject to the obligation of Kirby, Young, the Murchison defendants and Richardson to account for their dividends, income, gains and profits therefrom.

68. Pursuant to said plan and agreement Kirby and Young did cause and direct the Murchison defendants, Richardson and Alleghany to, and the Murchison defendants, Richardson and Alleghany did, enter into so-called option agreements, whereby Alleghany could and would acquire 135,000 shares of the 300,000 share interest of the other parties to said joint venture at a profit to the Murchison defendants and Richardson of $675,000, which options Kirby and Young did cause Alleghany to exercise so that their favored friends and associates would or should obtain the amount of $675,000 from Alleghany's assets, in violation of law, of their duties as fiduciaries, and in violation of the rights of and to the damage of Alleghany and its minority stockholders.

69. The certificates for the 600,000 shares of New York Central stock constituting the assets of the so-called joint-venture are all registered in the name of Alleghany or its registered nominee, or the registered nominee of the joint venture, and are held by Alleghany (together with the promissory notes of the Murchison defendants and Richardson for $7,500,000 secured by a pledge of their interest in said so-called joint venture) in the Borough of Manhattan, City and State of New York.

70. By reason of the premises, the so-called joint ventures pertaining to said 600,000 shares of New York Central stock are without consideration, ultra vires and void and constitute an actual and threatened waste and diversion of Alleghany's assets, and were entered into in breach of the fiduciary obligations of the Murchison defendants, Richardson, Kirby and Young to Alleghany and its minority stockholders, and such agreements are of no legal effect in granting to Richardson and the Murchison defendants any legal or beneficial interest and ownership in any part of the 600,000 shares of New York Central stock constituting the assets of the so-called joint ventures, or any rights under said options, but in equity such 300,000 shares of New York Central stock are owned legally and beneficially by Alleghany for its sole benefit, free and clear of any claim, right, title and interest, legal or equitable, of the Murchison defendants and Richardson thereon or thereto, but subject to the obligation of the Murchison defendants and Richardson, Kirby and Young to account for the profits, gains, income and dividends derived by them or any of them from such 600,000 shares of New York Central stock as well as from the 300,000 shares

[redacted] New York [redacted] to Richardson and the Murchison defendants [redacted] Young [redacted] hereinbefore set forth

[redacted] By reason of the premises, Alleghany, and the plaintiffs, and the other numerous stockholders of Alleghany for whose benefit the action is brought, are entitled to a decree cancelling and declaring null and void the several joint venture agreements, the options and the exercise of the options, adjudging that Alleghany holds all [redacted] shares of New York Central stock returned to be held by it subject to said joint venture agreement, free and clear of any joint venture agreement, and [redacted] for [redacted] benefit, free and clear of any claim, right, title or interest hereof or payable of the Murchison defendants and Richardson, subject to accounting for the cost thereof to such defendants, less the [redacted] which said defendants are obligated to account, adjudging that Young and Kirby hold the [redacted] shares of New York Central [redacted] acquired by them on the market, and the [redacted] shares of New York Central stock acquired by them through the Murchison defendants and Richardson from C. & O. impressed with a trust for Young, Kirby and that Alleghany is the legal and beneficial owner of such [redacted] shares of New York Central stock, subject to reimbursement [redacted] such defendant [redacted] the same for which said defendants are obligated to account

With respect to the [redacted] shares of interest claimed by the Murchison defendants and Richardson in the aforesaid joint ventures, which proposed to secure their promissory note for the $[redacted] cost thereof, Alleghany is entitled to a decree that it owns such stock as trustee and free of obligation to reimburse the cost thereof in any manner other than by returning such stock free of any equity or claim of beneficial interest [redacted] and by returning such promissory [redacted] in reduction of the principal amount [redacted] difference between the sum advanced [redacted] amount for which the defendants are [redacted] Murchison and Richardson are jointly

[redacted] than Young, Kirby, the [redacted] directors of Alleghany and [redacted] actions as set forth above or [redacted] and in the proper performance [redacted] acts and in violation of [redacted] and have failed [redacted] redress the said wrongs [redacted] resulting therewith

[redacted] of Alleghany to bring

[redacted] interest in the transactions com[plained of] the $[redacted] sup[plied] New York Central from [redacted] defendants and Richardson, [redacted] agreement with respect to [redacted] approving the option agree[ments] [redacted] shares

[redacted] sued by Young and Kirby

(c) The institution of the [illegible] is hostile hands and pursuant to [illegible] directors would be defendants [illegible]

74. Plaintiffs have no adequate remedy [illegible]

FOURTH CAUSE OF ACTION

75. Plaintiffs reallege paragraphs 1 [illegible]

76. As previously alleged, par. 44 a, Alleghany has issued and outstanding three classes of stock as follows:

(a) 4,615,976 shares of common stock [illegible] are, under Alleghany's by-laws, entitled [illegible] Alleghany's board of directors.

(b) 130,744 shares of [illegible] Series A $2.00 par value [illegible] tax preferred stock redeemable at $[illegible] per share plus accrued dividends. As of Mar. 1, 1965 such accumulated dividends amounted to $1.32 per share, making a total redemption price of $35 per share as of Mar. 1, 1965. In the event [illegible] continuance for specified periods, the holders of said [illegible] preferred stock are entitled to elect two members [illegible] board of directors. Such dividend default has existed for many years and continues to exist.

(c) 24,845 shares of $4 no par value [illegible] convertible stock, the holders of which are entitled [illegible] two members of Alleghany's board of directors.

Alleghany's board thus consists of eight members, six of whom are elected by the holders of the common stock.

77. On or about December 29, 1964 Alleghany announced its plan to offer to the holders of its Series A preferred stock [illegible] all or part thereof for new 6% $40 par value convertible preferred stock. At their meeting of February 25, 1965 Alleghany's board of directors authorized its management to make the offer and set the terms thereof. On March 1, 1965 Alleghany's management made [illegible] approval. Such announcement and offer [illegible] and other means and instrumentalities of interstate commerce. Under the terms of the offer each share of the [illegible] may be exchanged for 10 shares of the new convertible preferred stock. The latter stock is to have priority [illegible] not tendered for exchange. The holders of the new preferred stock will be entitled to elect two members [illegible] of directors. The new convertible preferred stock will be convertible by Alleghany until [illegible] 1, 1970. The new convertible preferred stock will be convertible into common stock of Alleghany [illegible] to be fixed by Alleghany's board of directors [illegible] ance with a conversion formula based upon the [illegible] common stock as of the closing date of the exchange [illegible] a cash payment of $2.75 for each share of [illegible] through the exercise of the conversion right.

78 If the exchange of the old Series A preferred stock for the new convertible preferred stock is carried out, the membership of Alleghany's board will be increased from eight to ten directors, of whom the common stockholders will continue to elect only four, i.e., less than half. Upon conversion of the convertible preferred stock into common stock, the total amount of common stock will be more than doubled. Moreover, such conversion will substantially dilute the proportionate equity of Alleghany's present common stockholders in Alleghany's assets and earnings.

79 Between April and December 1954, and in anticipation of such offer, but prior to its announcement, defendant Young acquired 5,000 and his wife, Anita O'Keefe Young, acquired 800 shares of Alleghany's Series A preferred stock. As of December 1, 1954 defendant Young and his said wife and defendant Kirby owned, directly and indirectly, an aggregate of 28,140 shares of Alleghany's Series A preferred stock, of more than 21% of the total outstanding.

80 The individual defendants who are directors of Alleghany have submitted the exchange offer to the I.C.C. for its approval, but intend not to apply for the S.E.C. approval required by the Investment Company Act.

81 By reason of the premises, the proposed exchange offer and exchange are and will be contrary to §§ 7(a), 18(c) and (d) of the Investment Company Act and did and will deprive Alleghany's stockholders of the protection afforded them by § 25(b) of said Act. By sponsoring and carrying out the exchange plan, the individual defendants did and will violate their fiduciary duties to Alleghany and its common and Series A preferred stockholders and will derive large personal profits at Alleghany's expense. In preparing and carrying out the illegal exchange plan, Alleghany was caused by the individual defendants to incur large and unjustified expenses. The consummation of the exchange plan will cause irreparable injury to Alleghany and its security holders, including the common stockholders. Plaintiffs, having no adequate remedy at law, the consummation of the exchange should be enjoined and the individual defendants should be required to account for their profits and Alleghany's losses.

SIXTH CAUSE OF ACTION

82 Plaintiffs reallege paragraphs "1" "4" and "76"

83 At various times from 1946 to date, Alleghany invited the holders of its Series A preferred stock to tender their said shares to Alleghany in exchange for cash or specified investment securities held in Alleghany's portfolio. The prices at which Alleghany invited such tenders were in excess of the market price of Alleghany's Series A preferred stock prevailing immediately before the issuance of such invitations. Prior to and in anticipation of such invitations, defendants Young and Kirby and members of their families purchased substantial amounts of Alleghany's Series A preferred stock in the market at prices less than those specified by Alleghany's aforesaid invitations; upon the issuance of such invitations, they tendered and sold such shares to Alleghany at substantial profits to themselves. The other

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1949
-1949
-1950

members of Alleghany Board [illegible]
to time, permitted the [illegible]
facts herein alleged. Such conduct [illegible]
fendants and their co-directors [illegible]
and the appropriation of [illegible]
to Alleghany.

91. At various times from 19[illegible] the
the valuable opportunity [illegible]
trolling shopping center [illegible]
one financially able to acquire [illegible]
could have resulted in substantial [illegible]
Young and Kirby and the other [illegible]
ture, as constituted from time [illegible]
the facts herein alleged, took [illegible]
acquire such properties [illegible]
defendants Young and Kirby [illegible]
conduct constituted a breach [illegible]
defendants Young and Kirby [illegible]
board of directors and the appropriation
monies belonging to Alleghany.

92. Defendant Chesapeake Industries, Inc. [illegible]
matter) is an Ohio corporation [illegible]
Inc. Defendants Young and Kirby [illegible]
their families and nominees, did at all [illegible]
now do own and control, directly and indirectly, [illegible]
the stock and the debt of Chesapeake [illegible]
During all such time defendants [illegible]
defendants did and they now do [illegible]
of Chesapeake and control [illegible]
The membership of Chesapeake's board [illegible]
are set forth in Exhibit C annexed hereto. [illegible]
of Chesapeake include Kenneth M. [illegible]
Young, Robert W. Purcell who was an officer [illegible]
until 1952, J. F. Anzinger a director until [illegible]
1954, Henry J. Gould and Andrew Van Pelt.
Charles Shipman, president of [illegible]
Alleghany, William R. Dan[illegible]
of a corporation in which Alleghany [illegible]
C. T. Ireland, Jr. an officer of Alleghany [illegible]
personal representative of the Marshall [illegible]

93. At various times from 19[illegible] to late Alleghany [illegible]
the valuable opportunities of acquiring [illegible]
in various enterprises, including [illegible]
was financially able to acquire [illegible]
tion would have resulted in substantial [illegible]
ants Young and Kirby, the Marshall [illegible]
members of Alleghany's board of directors [illegible]
to time, with knowledge or notice of the facts [illegible]
and refused to permit Alleghany to acquire [illegible]
which were instead acquired by Chesapeake [illegible]
interests were the following:

(c) The Virginia Metal Products Corporation, a large manufacturer of tool presses, which Chesapeake acquired at the end of 1953 and in early 1954 for about $1,000,000

(d) The Vandewater Paper Company which Chesapeake acquired in May, 1954

(e) The Lathrop Paper Company which Chesapeake acquired in August, 1954. The and the Vandewater Paper Company were consolidated in 1954 into the Lathrop Vandewater Paper Company which was resold by Chesapeake in 1954 at a substantial profit

(f) All the stock of the Allen D Caldwell Manufacturing Corporation and The Caldwell Manufacturing Company, which was acquired by Chesapeake in December 1954. Said corporations were thereafter consolidated into The Allen D Caldwell Electronics Production Corp

(g) All the stock of Chesapeake Printing Corporation acquired by Chesapeake in March, 1954

(h) All the stock of National Transit-Ads, Inc., a corporation engaged in selling advertising in municipal transportation systems which stock was acquired by Chesapeake in August, 1954

(i) [illegible] of the stock of Colonial Trust Company, a commercial bank in New York City which was acquired by Chesapeake in December, 1954 and January, 1955

(j) [illegible] stock interest in Intercoast Petroleum Corporation, an oil producing company, Oils & Industries, Inc., and Home & Foreign Securities Corporation (both of them registered investment companies), all of which were acquired by Chesapeake in December 1954 and January 1955. Said three companies were thereupon merged into Pathé Film Studios, Inc., a subsidiary of Chesapeake and the resulting company, a wholly owned Chesapeake subsidiary, was named Intercoast Petroleum Company, Inc.

(k) A controlling stock interest in Intercontinental Holdings Ltd., a registered investment company, which was acquired by Chesapeake in December 1954 and January, 1955. Said company was thereupon split into and its assets, consisting solely of cash, were distributed among its stockholders, resulting in a substantial profit to Chesapeake

All of said transactions resulted in substantial profits and advantages to Chesapeake which, by reason of the premises, were diverted from Allegheny.

[illegible] Plaintiff repeats paragraphs "40" and "41".

SEVENTH CAUSE OF ACTION

[illegible] Plaintiff repeats paragraphs "1" "4" and "38".

[illegible] 1955 and at the time of the transaction herein alleged, the defendants Arnstein, Bruce, Foskett, Guild, Kirby, Neff, Van [illegible] were constituted the Board of directors of Allegheny.

90. The transaction hereinafter alleged was caused by the then directors of Alleghany pursuant to a conspiracy among them.

91. On or about July 11, 1961, Alleghany sold to the Pennsylvania Coal & Coke Corporation ("Pennsylvania" hereinafter) a large block of stock of Industrial Brownhoist Corporation ("Brownhoist" hereinafter) for $2,000,382.39, payable partly in cash and partly in three promissory notes maturing on July 15th of each of the years 1964, 1965 and 1966 [illegible] per cent.

92. In addition to said purchase price, Pennsylvania agreed to and did pay to Chesapeake a total commission of $111,[illegible] partly in cash and partly through the delivery of three promissory notes having the same maturity dates as those mentioned in paragraph "91".

93. Chesapeake performed no services for Alleghany in the sale of said Brownhoist stock, the commission paid by Pennsylvania to Chesapeake actually constituted part of the purchase price, the amount of such commission should have been paid to Alleghany, its diversion to Chesapeake constituted a gift and waste of the corporate assets of Alleghany.

94. Plaintiffs reallege paragraphs "6" and "7".

EIGHTH CAUSE OF ACTION

95. Plaintiffs reallege paragraphs "1" "4".

96. In 1962 and at the time of the transaction herein alleged, the defendants Ansalone, Bateman, Briggs, Probett, Kirby, Neff, Parcell, Swinnerton, Van Pelt and Young constituted the board of directors of Alleghany.

97. The transaction hereinafter alleged was caused by the then directors of Alleghany pursuant to a conspiracy among them.

98. In 1962 Alleghany entered into the following transaction with defendant Neff, one of its directors:

(a) Alleghany purportedly sold to defendant Neff 5,000 shares of the common stock of Portsmouth Steel Corporation at a price of $67,500 ($13.50 per share).

(b) Defendant Neff delivered to Alleghany, as collateral, promissory note in the sum of $67,500 due September 10, 1967, bearing interest at the rate of 4% per annum payable quarterly and secured by the aforesaid 5,000 shares of common stock of Portsmouth Steel Corporation.

(c) It was expressly stipulated that defendant Neff was under no personal obligation to pay said promissory note or to pay the purchase price for the stock sold to him.

(d) In the event of default, the rights of Alleghany under said note were to be discharged in full by the delivery to it of the collateral security held thereunder.

(10) The aforesaid transaction constituted a gift by Alleghany of a valuable corporate asset to defendant Neff and was ultra vires and void because

(a) Defendant Neff at once obtained the full legal title to and beneficial interest in the aforesaid stock, with the right to vote and to receive dividends, subject only to the security interest retained by Alleghany

(b) Defendant Neff undertook no personal liability for the principal of or interest on the purchase price and the aforesaid collateral promissory note

(c) Alleghany thus parted with valuable property rights and, in exchange, received nothing that it did not have prior to the transaction

(d) The annual dividends on the Portsmouth Steel stock thus transferred to defendant Neff did, do and will continue to substantially exceed the annual interest on the note

(e) No part of the principal sum of $[illegible] has been paid to Alleghany

(f) The present market value of the Portsmouth Steel Corporation common stock is about $15 per share

(g) Defendants have converted the aforesaid [illegible] shares of common stock of Portsmouth Steel Corporation to their own use and should account to Alleghany for its loss and their profits

(h) Plaintiff realleges paragraphs 16 and "17".

Wherefore, plaintiff prays for judgment against the defendants as follows

1. That the individual defendants be required to account for their profits and [illegible] to Alleghany as a result of the acts complained of and [illegible]

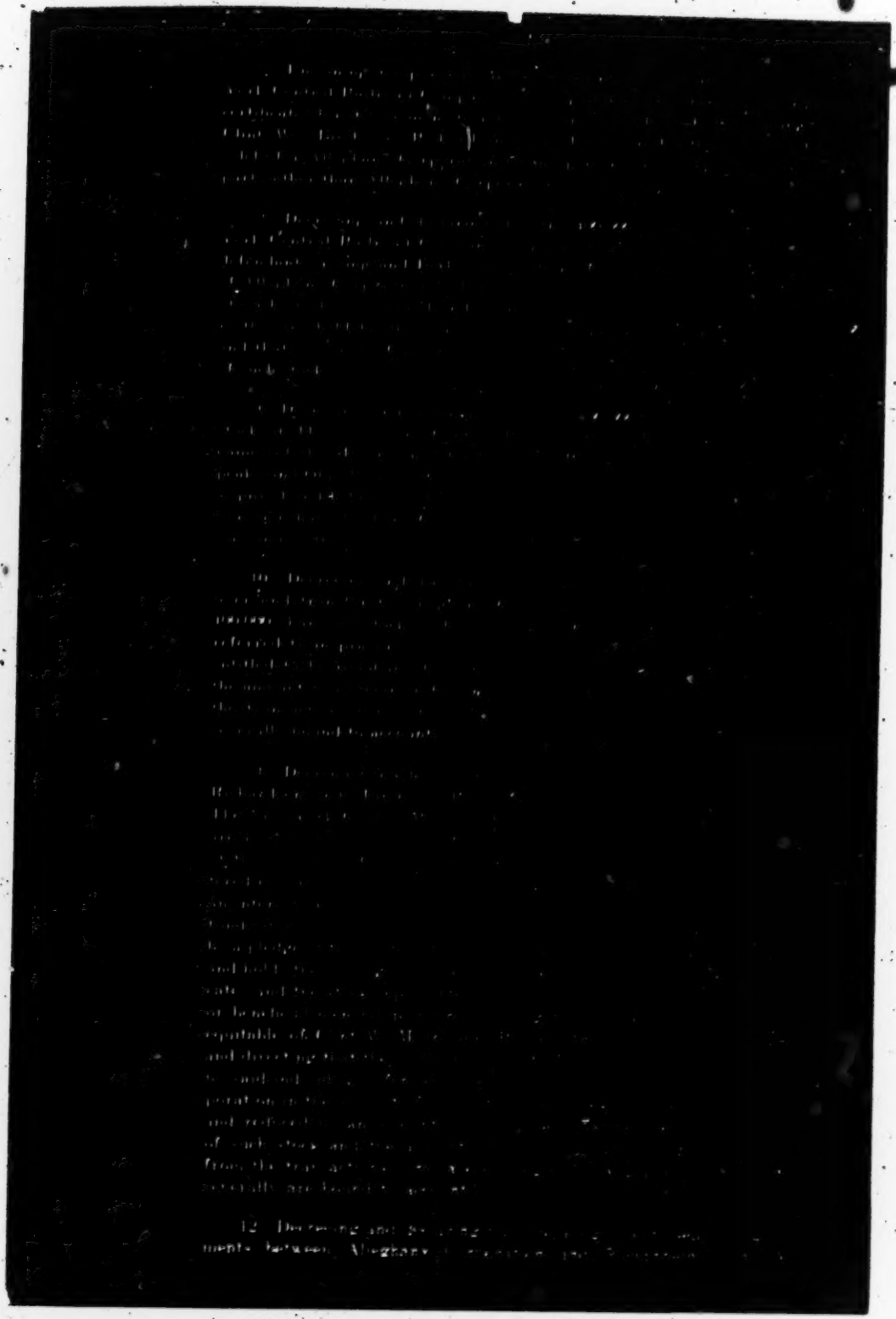
2. That the [illegible] and transfer by Alleghany of its stock holdings in [illegible] Steel Services, Inc. to defendants Young and [illegible] and the [illegible] defendants, including all agreements [illegible]

3. That the [illegible] dated January 19, 1954 and [illegible] be declared [illegible] with the provision of § 3 of the [illegible]

4. That the individual defendants be required to cause Alleghany to [illegible] Corporation Act

5. That a permanent receiver for Alleghany

6. That the individual defendants from consummating the proposed exchange of Second Series A preferred stock [illegible] preferred stock and declaring void any amendment [illegible] State of incorporation which may be [illegible] the proposed exchange



Murchison and or Murchison Brothers with respect to 600,000 shares of stock of The New York Central Railroad Company are null and void and cancelled and of no legal effect, and enjoining, temporarily and permanently, the enforcement of such pool, voting agreements and the receipt or payment of any sum thereunder which constitutes a loan to Alleghany Corporation or a profit to any individual defendant directly or indirectly.

4) Awarding to plaintiff the cost and expenses of this action including reasonable counsel and accountants fees.

5) Granting plaintiff Alleghany Corporation and such other and further relief as may be just.

Cravath Lee & Hutcheson
General Counsel for Plaintiff
52 Madison Avenue
New York 1, N. Y.

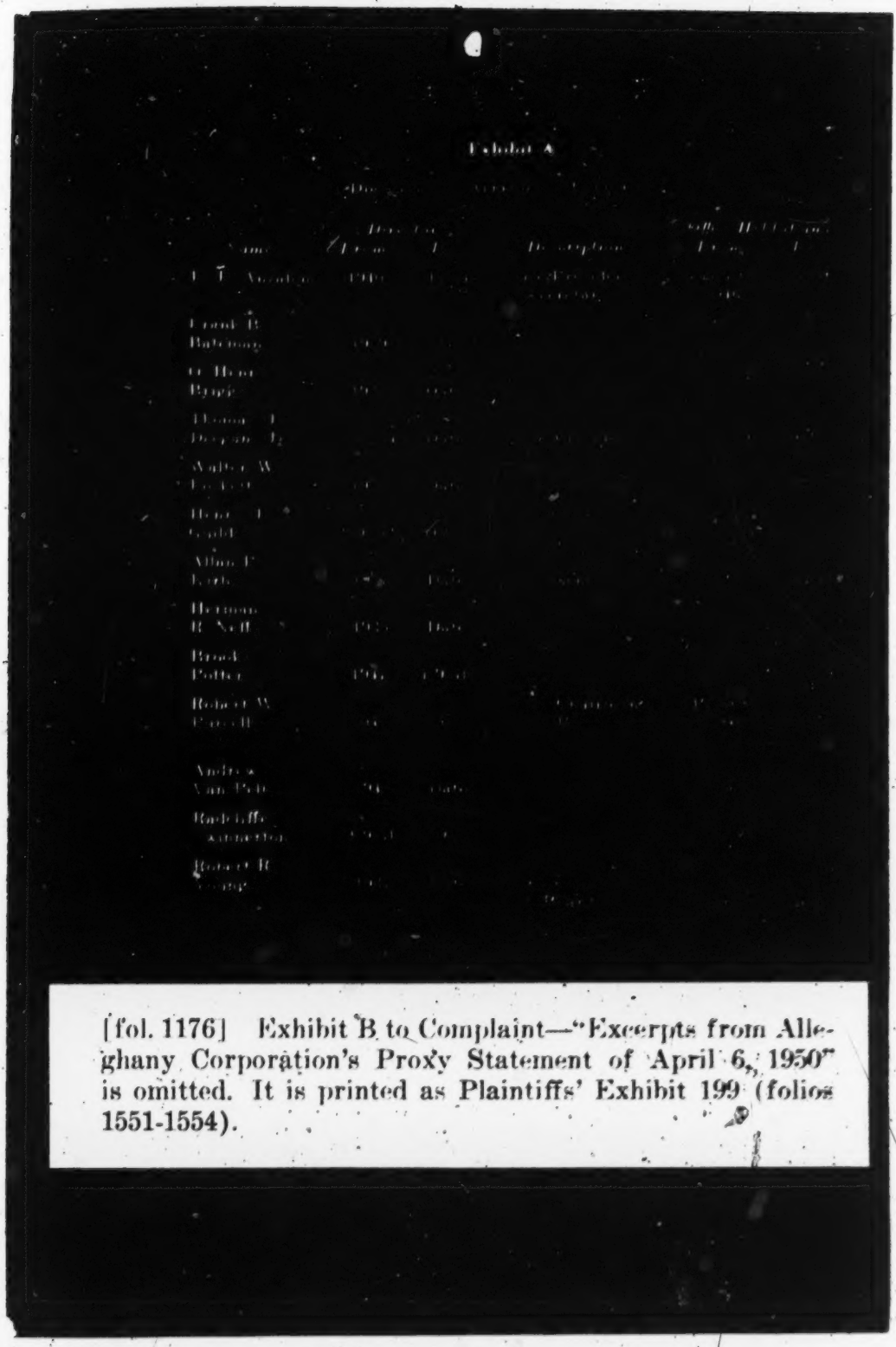


Exhibit A

[fol. 1176] Exhibit B to Complaint—"Excerpts from Alleghany Corporation's Proxy Statement of April 6, 1950" is omitted. It is printed as Plaintiffs' Exhibit 199 (folios 1551-1554).

[fol. 1183]

IN THE UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT No. 2

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK.

Index No. 7244/1954

SADIE ZENN, *et al.*,

Plaintiffs,

—against—

J. J. ANZALONE, *et al.*,

Defendants.

STIPULATION OF SETTLEMENT

WHEREAS, in the above entitled consolidated action (hereinafter called the "action") the plaintiffs, as stockholders of defendant Alleghany Corporation (hereinafter called "Alleghany"), assert on behalf of Alleghany and its stockholders the claims set forth in the consolidated amended complaint (hereinafter called the "complaint") heretofore served in the action; and

WHEREAS, the following defendants, to wit:

(a) Thomas J. Deegan, Jr. and Robert R. Young, who have appeared in the action by their attorneys, Lord, Day & Lord, Esq.;

[fol. 1184] (b) Allan P. Kirby, who was served with summons outside the State of New York, and who has neither appeared nor answered in this action, his time for appearing, moving or making any motion having

been extended by stipulation of the plaintiffs' attorneys;

(c) J. J. Anzalone, Frank B. Bateman, O. Henry Briggs, Walter W. Foskett, Henry J. Guild, Herman R. Neff, Brooks Potter, R. W. Purcell, Radcliffe Swinnerton and Andrew Van Pelt, who have neither been served nor appeared in the action, but who have authorized Mr. David W. Wallace as their attorney in fact to sign this stipulation of settlement,

All of said defendants listed in "(a)", "(b)" and "(c)" *supra* being hereinafter referred to as the "director-defendants";

(d) Clint W. Murchison, Sidney W. Richardson, and Clint W. Murchison, Jr. and John D. Murchison, individually and as partners, doing business under the firm name and style of Murchison Brothers, ~~who have appeared specially herein~~ by their attorneys, Satterlee, Warfield & Stephens, Esq;

(e) Chesapeake Industries, Inc., appearing by its attorney, James L. O'Connor, Esq.;

(f) The New York Central Railroad Company, appearing by its attorneys, Lord, Day & Lord, Esqs.; and

(g) Alleghany Corporation, appearing herein by its attorney, Peter George Martin, Jr., Esq.,

[fol. 1185] are desirous, for the purpose of avoiding the time and expense of further burdensome litigation, the continuation of which, in the opinion of the director-defendants, will not be in the best interests of Alleghany Corporation, to settle and compromise the claims alleged in the complaint; and

WHEREAS, the undersigned plaintiffs are likewise desirous to settle and compromise the claims alleged in the complaint;

NOW, THEREFORE, it is stipulated and agreed by and among the undersigned that said claims be settled, subject to the approval of this Court, as hereinafter set forth, on the following terms and conditions:

1. Neither this stipulation nor any proceedings thereunder shall be construed or deemed to be evidence, or an admission on the part of the above named defendants, of any liability or wrongdoing whatsoever; nor shall they be offered in evidence as such, nor constitute a general or special appearance in the action by any defendant.

2. Since April 9, 1954, the date of the commencement of the action, the following things touching the claims alleged in the complaint have been done and will be done, as hereinafter set forth:

(a) By contract dated July 15, 1954, between Alleghany and defendant Sidney W. Richardson, and by contract dated July 15, 1954, between Alleghany and defendants [fol. 1186] Murchison Brothers, as amended by contract dated November 30, 1954, defendants Sidney W. Richardson and Murchison Brothers gave Alleghany certain confirmatory guaranties against loss from its investment in 300,000 shares of the common stock of The New York Central Railroad Company (hereinafter called "New York Central"), together with certain confirmatory guaranties of a 4½% minimum return on its said investment, all as more fully set forth in said contracts.

(b) By the same contracts defendants Sidney W. Richardson and Murchison Brothers gave Alleghany the privilege, for a period of five years, to exercise the voting rights pertaining to an additional 300,000 shares of New York Central common stock belonging beneficially to defendants Sidney W. Richardson and Murchison Brothers, respectively, and to pledge such 300,000 New York Central shares as security for debts of or loans to Alleghany, all as more fully set forth, and subject to the terms provided, in said contracts.

(c) By contract dated December 13, 1954 defendants Murchison Brothers granted Alleghany options to buy up to 135,000 shares of the common stock of New York Central, all as more fully set forth in said contract; on April 27, 1955 Alleghany exercised said options and purchased 135,000 shares of said stock at an average price of $30 per share; the market price of said stock on April 27, 1955, the date of the exercise of said options, was $42 high, $40⅞ low, an average of $41 7/16; the difference between the price paid by Alleghany for said 135,000 shares and their [fol. 1187] market value as of April 27, 1955, the date of the exercise of said options, was $1,544,062.50.

(d) On May 26, 1955, New York Central paid Alleghany the sum of $1,308,733.71 as reimbursement for expenses incurred by Alleghany in connection with the proxy contest referred to in the complaint.

(e) By agreements dated as of June 30, 1951, the defendants Murchison Brothers and Clint W. Murchison have undertaken certain guaranties to Alleghany with respect to the joint ventures between Murchison Brothers and Alleghany. The individual defendants will arrange, upon consummation of the settlement, for Murchison Brothers and Clint W. Murchison to amend and strengthen the terms of their guaranties by entering into an agreement with Alleghany containing substantially the terms set forth in Exhibit "A" annnexed hereto. An agreement substantially in the form of Exhibit "A" annexed hereto shall be forthwith executed, in duplicate, by Alleghany, Murchison Brothers and Clint W. Murchison, and shall be placed in escrow with Lord, Day & Lord, Esqs., for delivery to Alleghany and Murchison Brothers upon consummation of the settlement; if the settlement shall not be approved by the Court, as hereinafter provided, the agreement shall not be delivered by the escrow agents to Alleghany and Murchison Brothers, but shall be cancelled by the escrow agents.

(f) The defendants other than Alleghany, Chesapeake Industries, Inc. and The New York Central Railroad Com-

pany shall, upon consummation of the settlement, pay or cause to be paid to Alleghany the sum of $700,000.

[fol. 1188] 3. In consideration of the premises, Alleghany and the undersigned plaintiffs in this action agree with the above named defendants (other than Alleghany), that the payment, the execution and delivery of the agreement and the other matters provided for in paragraph "2" shall constitute full and complete satisfaction and discharge of all claims alleged in the complaint as against all defendants named in the complaint, other than Alleghany; provided, however, that this stipulation, and all proceedings, notices and acts connected therewith shall be without prejudice to:

(a) Any judicial or administrative decision, ruling or determination concerning Alleghany's obligation, if any, to register under and otherwise conform to the Investment Company Act of 1940, United States Code, Title 15, §§ 80a-1, et seq.;

(b) The claim alleged in the complaint for an injunction against the proposed exchange by Alleghany of its 5½% Series A $100 Par Value Cumulative Preferred Stock against its new 6% $10 Par Value Convertible Preferred Stock.

4. Alleghany will, upon consummation of the settlement, execute and deliver to each of the other defendants named in the complaint a release substantially in the form annexed hereto as Exhibit "B".

5. This stipulation of compromise and settlement, promptly after its execution, shall be submitted for approval to the Supreme Court of the State of New York. If [fol. 1189] the compromise and settlement herein proposed is not approved by the Supreme Court on or before July 31, 1956 (unless this date is extended by the consent of the parties hereto) then and in that event this stipulation and all proceedings thereunder shall, at the option of the individual parties defendant to be exercised by a notice in writing given by Lord, Day & Lord, Esqs., on behalf of said defendants to Pomerantz Levy & Haudek, Esqs., on behalf

of the parties plaintiff hereto, be cancelled and shall be of no force and effect, and in the event that this stipulation shall become of no force and effect by reason of the event above specified in this paragraph or for any other reason whatsoever, then in such case all parties to the action shall stand in the same position without prejudice as if this stipulation of compromise and settlement had not been made or submitted to the Court for consideration and approval.

6. If the settlement shall be so approved by said Court, judgment shall be entered in the action in the appropriate form:

(a) Approving this stipulation of settlement, adjudging it fair, adequate and proper and directing its consummation and further directing that Alleghany, upon the consummation of this settlement, as herein provided, shall make and deliver a general release in the form annexed hereto as Exhibit "B" to all of the other defendants named in the complaint;

(b) Dismissing without prejudice the claim alleged in the complaint for an injunction against the proposed ex- [fol. 1190] change by Alleghany of its outstanding 5½% Series A $100 Par Value Cumulative Preferred Stock against its new 6% $10 Par Value Convertible Preferred Stock;

(c) Dismissing all other claims alleged in the complaint on the merits, with prejudice against Alleghany, its stockholders and its and their successors and assigns;

(d) Directing that the judgment shall be without prejudice to any judicial or administrative decision, ruling or determination concerning Alleghany's obligation, if any, to register under and otherwise conform to the Investment Company Act of 1940, United States Code, Title 15, §§ 80a-1 et seq.;

(e) Reserving jurisdiction over the consummation of this settlement.

7. The consummation of this settlement shall await the entry of a final judgment of approval as above described,

the expiration of the time to appeal therefrom, or, if an appeal be taken therefrom, the final disposition of the appeal.

8. If the settlement shall be approved as hereinbefore provided, the plaintiffs in the action, their attorneys, counsel and accountants may apply to the Court for an allowance of their expenses, including reasonable counsel and accountant fees, to be paid by Alleghany. No costs, disbursements or allowances in connection with this action or with a companion action entitled "Sadie Zenn, et al., Plaintiffs, against J. J. Anzalone, et al., Defendants", now [fol. 1191] pending in the United States District Court for the Southern District of New York (Civ. No. 92-205), shall be charged against any of the parties thereto.

9. If the Court should refuse to approve this stipulation of settlement, or if judgment of approval should be reversed on appeal, then and in either of these events this stipulation of settlement shall be and become null and void and of no further force and effect.

10. Any of the plaintiffs and any of the defendants in the action who are not parties to this stipulation of settlement may become parties thereto by giving written notice of their desire to become parties to the stipulation of settlement to Pomerantz Levy & Haudek, Esqs. and Lord, Day & Lord, Esqs. Such notice shall be given not later than September 15, 1955.

Dated: New York, N. Y.
July 25, 1955.

POMERANTZ, LEVY & HAUDEK
Pomerantz, Levy & Haudek
Attorneys for plaintiffs Sadie Zenn and Freda Blumenthal

SIDNEY GARWIN
Sidney Garwin
Attorney for plaintiff Henry Mencher

[fol. 1192]

ABRAHAM M. GLICKMAN
Abraham M. Glickman
Attorney for plaintiff Abraham L. Fistel

TROTTA & SPATA
and
NEMEROV & SHAPIRO
Trotta & Spata
and
Nemerov & Shapiro
Attorneys for plaintiff Nicholas Schepis

LORD, DAY & LORD
Lord, Day & Lord
Attorneys for defendants, Thomas J. Deegan, Jr., Robert R. Young and The New York Central Railroad Company

SATTERLEE, WARFIELD & STEPHENS
Satterlee, Warfield & Stephens
Attorneys for defendants Clint W. Murchison, Sidney W. Richardson and Clint W. Murchison, Jr. and John D. Murchison, individually and as partners, doing business under the firm name and style of Murchison Brothers

[fol. 1193]

DAVID W. WALLACE
David W. Wallance
Attorney in fact for defendants J. J. Anzalone, Frank B. Bateman, O. Henry Briggs, Walter W. Foskett, Henry J. Guild, Herman R. Neff, Brooks Potter, R. W. Purcell, Radcliffe Swinnerton and Andrew Van Pelt and Allan P. Kirby

JAMES L. O'CONNOR
James L. O'Connor
Attorney for defendant Chesapeake Industries, Inc.

PETER GEORGE MARTIN, JR.
Peter George Martin, Jr.
Attorney for defendant Alleghany Corporation

LEVISS & GORDON
Leviss & Gordon
Attorneys for plaintiff Bernard Lieberman

NORMAN ANNENBERG
Norman Annenberg
Attorney for plaintiff Jeanette Annenberg

CHARLES TRYNIN & IRVING STEINMAN
Charles Trynin and Irving Steinman
Attorneys for plaintiff Frances Koenig

[fol. 1194]

EXHIBIT "A"

MURCHISON BROTHERS
1201 MAIN STREET
DALLAS 2, TEXAS

July , 1955.

Alleghany Corporation
4500 Chrysler Building
New York 17, N. Y.

Dear Sirs:

We hereby confirm our agreement with you that, for valuable consideration received by us, the Loan and Guar-

anty Agreement, dated as of June 30, 1951, as amended, shall be and it hereby is further amended as follows:

1. So much of paragraph "4(a)" of said Agreement as provides that all of the joint ventures between us are to be treated on a consolidated basis for purposes of determining our obligation to indemnify you against loss in respect of your contributions thereto, shall be inapplicable to any of the joint ventures now pending or hereafter to be made between us, it being our intention that our obligation to indemnify you against loss from any of said joint ventures shall be determined independently of gains realized from any other joint venture between us; and upon the termination of any such joint venture resulting in a loss, the amount of your share in such loss shall be promptly paid by us to you.

[fol. 1195] 2. So much of paragraph "5" of said Agreement as directs that our income guaranty therein provided shall be based on your average aggregate contributions to the joint ventures in effect during each of your fiscal years, shall, beginning as of January 1, 1955, be modified to provide that such income guaranty shall be determined separately with respect to each of the joint ventures between us, it being our intention that a deficiency in the income from any one joint venture shall not be offset by an excess of income from any other joint venture.

3. In all other respects the aforesaid Agreement, as heretofore amended, shall continue in full force and effect.

If the foregoing accurately reflects our agreement, kindly countersign the duplicate copy of this letter and return it to us.

Very truly yours,

MURCHISON BROTHERS

By .....
a partner

By .....
a partner

ACCEPTED:
JULY , 1955.

ALLEGHANY CORPORATION

By .....
President

[fol. 1196] For valuable consideration, I, Clint W. Murchison, hereby agree that my guaranty heretofore executed and dated as of June 30, 1951 shall apply to the Loan and Guaranty Agreement between Murchison Brothers and Alleghany Corporation, dated as of June 30, 1951, as amended, including the amendments set forth in the foregoing letter agreement between Murchison Brothers and Alleghany Corporation, dated July , 1955.

Dated: July , 1955

.....
Clint W. Murchison

[fol. 1197]

EXHIBIT "B"

KNOW ALL MEN BY THESE PRESENTS that Alleghany Corporation, a corporation organized and existing under the laws of the State of Maryland (hereinafter called "Alleghany"),

In consideration of One Dollar ($1) and other good and valuable consideration, receipt whereof is hereby acknowledged,

Pursuant to authority conferred upon it by judgment of the Supreme Court of the State of New York, County of New York (County Clerk's Index No. 7244/1954) and pursuant to a vote of its Board of Directors,

Does hereby remise, release and discharge

J.J. Anzalone
Frank B. Bateman
O. Henry Briggs
Thomas J. Deegan, Jr.
Walter W. Foskett
Henry J. Guild
Allan P. Kirby
Clint W. Murchison
Herman R. Neff
Brooks Potter
R.W. Purcell
Sidney W. Richardson
Radcliffe Swinnerton
Andrew Van Pelt
Robert R. Young

Clint W. Murchison, Jr. and John D. Murchison, individually and as partners, doing business under the firm name and style of Murchison Brothers

Chesapeake Industries, Inc. and
New York Central Railroad Company

of and from all claims, demands and causes of action of whatever kind or nature, whether at law or in equity, which against them or any of them have arisen, or now exist or [fol. 1198] may hereafter arise by reason of any of the matters and things alleged, referred to or embraced in the consolidated amended complaint heretofore served in an action entitled "Sadie Zenn, et al., Plaintiffs, against J. J. Anzalone, et al., Defendants", brought in the Supreme Court of the State of New York, County of New York (County Clerk's Index No. 7244/1954), or arising in any way out of the facts or transactions therein referred to.

IN WITNESS WHEREOF, Alleghany Corporation has caused these presents to be executed in its name and behalf and its corporate seal to be hereunto affixed by

its

hereunto duly authorized, this day of 1955.

ALLEGHANY CORPORATION

By: .....

[fol. 1199]

IN THE UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT No. 3

At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, Pearl and Centre Streets, in the Borough of Manhattan, New York, N. Y., on the 18th day of August, 1955.

Present:

Honorable OWEN MCGIVERN
Justice.

Index No. 7244/1954

SADIE ZENN, et al.,

Plaintiffs,

—against—

J. J. ANZALONE, et al.,

Defendants.

A motion having been duly made by Alleghany Corporation for judicial inquiry into and determination on the merits of the fairness, reasonableness and adequacy of the stipulation of settlement herein, dated July 25, 1955, and the settlement of this action provided for therein and for the approval thereof and for such other and further relief as to the Court may seem just and proper,

Upon reading and filing the notice of motion dated July 27, 1955, and the affidavit of Peter George Martin, Esq., sworn to July 27, 1955, and the stipulation of settlement dated July 25, 1955, annexed thereto, with proof of due service thereof, in support of said motion, and the mo-

tion having been submitted to the Court without opposition by any of the parties; and this Court being of the opinion that the aforesaid stipulation of settlement dated July 25, 1955, merits consideration as to its fairness, reasonableness and adequacy, and that inquiry should be made into the [fol. 1200] facts in order to enable the Court to determine and adjudge its fairness, reasonableness and adequacy, and it appearing that such inquiry will involve the consideration and study of many documents and much evidence which would unduly consume the time of the Court in the first instance; and due deliberation having been had, and upon filing the opinion of the Court, it is

ORDERED that Robert J. Fitzsimmons, of 654 Madison Avenue, New York City, N. Y., an attorney and counsellor at law, be and he hereby is appointed Referee to conduct a hearing into the fairness, reasonableness and adequacy of the aforesaid stipulation of settlement and to render his report to the undersigned as to whether or not said proposed settlement should be approved and confirmed; and it is further

ORDERED that such hearing before said Referee shall be held at the Association of the Bar of the City of New York, in Room 605, 42 West 44th Street, New York City, N. Y., on September 19, 1955, at ten thirty o'clock in the forenoon, and at such other times and places as said Referee may hereafter determine; and it is further

ORDERED that notice of the proposed settlement and the hearing thereon shall be given to the stockholders of Alleghany Corporation in the following manner: Alleghany Corporation shall mail, on or before August 26, 1955, to its stockholders of record, at the close of business on August 19, 1955, a copy of the notice annexed hereto as Exhibit A, the form of which is hereby approved; and it is further

ORDERED that compliance with the provision of the last preceding paragraph of this order shall constitute sufficient notice to the stockholders of Alleghany Corporation; and it is further

[fol. 1201] ORDERED that upon the filing of the report of the aforesaid Referee this Court shall, upon appropriate application, fix a time and place for a hearing thereon and on said stipulation of settlement before the undersigned; and if said stipulation of settlement be finally approved, appropriate judgment shall be entered in accordance with the terms and provisions set forth in the stipulation of settlement, and if a settlement in accordance with said stipulation of settlement shall not be finally approved and consummated in accordance with its provisions, then said stipulation of settlement and all proceedings had in connection therewith shall be without prejudice to the rights of any of the parties, as provided in said stipulation of settlement; and it is further

ORDERED that until the settlement proceedings before the Court shall be determined, all proceedings in the above entitled action, other than the proceedings upon or pursuant to this order and the stipulation of settlement, shall be stayed; and it is further

ORDERED that, without regard to the expiration of any Term of this Court, the undersigned shall retain jurisdiction of this action and of all applications and proceedings relating to the stipulation of settlement, and all proceedings connected with and necessary for its consummation in the event that it is approved, including the awarding of al-
[fol. 1202] lowances, costs, expenses and disbursements to the attorneys, counsel and accountants for the parties hereto.

Enter

O. Mc G.
J.S.C.

The making and entry of the foregoing order is hereby consented to.

Dated: August 17, 1955

/s/ POMERANTZ LEVY & HAUDEK
Pomerantz Levy & Haudek,
General Counsel for Plaintiffs

/s/ PETER GEORGE MARTIN
Peter George Martin,
Attorney for Defendant
Alleghany Corporation

/s/ LORD, DAY & LORD
Lord, Day & Lord,
Attorneys for Defendants
Thomas J. Deegan, Jr., et al.

/s/ SATTERLEE, WARFIELD & STEPHENS
Satterlee, Warfield & Stephens,
Attorneys for Defendants
Clint W. Murchison, et al.

/s/ JAMES L. O'CONNOR
James L. O'Connor,
Attorney for Defendant
Chesapeake Industries, Inc.

[fol. 1203]

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. 7244/1954

SADIE ZENN, FREDA BLUMENTHAL, HENRY MENCHER, ABRAHAM L. FISTEL, JEANETTE ANNENBERG, BERNARD LIEBERMAN, NICHOLAS SCHEPIS, JACOB HAIMOWITZ and FRANCES KOENIG,

Plaintiffs,

—against—

J. J. ANZALONE,
FRANK B. BATEMAN,
O. HENRY BRIGGS,
THOMAS J. DEEGAN, JR.,
WALTER W. FOSKETT,
HENRY J. GUILD,
ALLAN P. KIRBY,
CLINT W. MURCHISON,
HERMAN R. NEFF,
BROOKS POTTER,
R. W. PURCELL,
SIDNEY W. RICHARDSON,
RADCLIFFE SWINNERTON,
ANDREW VAN PELT,
ROBERT R. YOUNG,

CLINT W. MURCHISON, JR. and JOHN D. MURCHISON, individually and as partners, doing business under the firm name and style of MURCHISON BROTHERS,

CHESAPEAKE INDUSTRIES, INC., NEW YORK CENTRAL RAILROAD COMPANY and ALLEGHANY CORPORATION,

Defendants.

TO THE STOCKHOLDERS OF ALLEGHANY CORPORATION:

Pursuant to an order of Honorable Owen McGivern, Justice of the Supreme Court of the State of New York, made and entered in the above entitled action, notice is hereby given that a hearing will be held, before Robert J. Fitzsimmons, Esq., at the Association of the Bar of the

City of New York, Room 605, 42 West 44th Street, New York City, New York, on September 19, 1955, at 10:30 A.M., upon an application for the approval of a proposed settlement of the claims alleged in said action and for the entry of an appropriate judgment carrying the settlement into effect.

[fol. 1204] A copy of the stipulation of proposed settlement is annexed hereto as Exhibit A.

The above entitled action results from the consolidation of ten stockholders' suits instituted on behalf of Alleghany Corporation and its stockholders. The consolidated amended complaint served in the action names as defendants all of the present directors of Alleghany Corporation and many of its past directors, as well as other persons, firms and corporations allegedly associated with or controlled by some of the directors of Alleghany Corporation. Said complaint charges, among other things, that the defendants, or some of them, entered into various transactions with Alleghany Corporation upon terms unfair to Alleghany Corporation and unduly favorable to themselves; that the defendants, or some of them, appropriated business opportunities allegedly belonging to Alleghany Corporation; and that the alleged conduct of the defendants constituted a breach of their fiduciary obligations to Alleghany Corporation and a violation of certain statutory enactments, including the Investment Company Act of 1940 and the Securities Exchange Act of 1934. The complaint demands, among other things, the rescission of some of the alleged transactions between Alleghany Corporation and some of the defendants and an accounting by the defendants to Alleghany Corporation for their profits and its losses.

The defendants deny all charges of wrongdoing and contend that the complaint should be dismissed.

For a full and detailed statement of the matters involved in the litigation, reference is made to the pleadings which

are open for inspection during business hours at the office [fol. 1205] of Pomerantz Levy & Haudek, Esqs., General Counsel for the plaintiffs in the action, at 295 Madison Avenue, New York 17, N. Y., and at the office of Peter George Martin, Esq., the attorney for Alleghany Corporation, at 25 Broadway, New York 4, N. Y.

Any and all stockholders of Alleghany Corporation may attend and be heard at the hearing on the proposed settlement.

Dated: , 1955.

ALLEGHANY CORPORATION

By: .....
Secretary

[fol. 1206]

IN THE UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT NO. 7

NOTICE OF ENTRY OF ORDER

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Index No. 7244/1954

SADIE ZENN, *et al.*,

Plaintiffs,

against

J. J. ANZALONE, *et al.*,

Defendants,

SAMUEL R. ROSEN,

Objectant.

SIRS:

PLEASE TAKE NOTICE that the within is a true copy of an order duly made and entered herein in the office of the Clerk of the Supreme Court, New York County, on the 28th day of December, 1959.

Dated: New York, N. Y.
December 30, 1959.

Yours, etc.,

CHARLES T. IRELAND, JR.
Attorney for Defendant
Alleghany Corporation
Office & P.O. Address
230 Park Avenue
New York, New York

* * * * *

[fol. 1207] ORDER

At a Special Term, Part I, of the Supreme Court, held in and for the County of New York, at the County Court House, in the Borough of Manhattan, City of New York, on the 28th day of December, 1959.

Present—Honorable OWEN MCGIVERN, Justice

Index No. 7244/1954

SADIE ZENN, *et al.*,

Plaintiffs,

against

J. J. ANZALONE, *et al.*,

Defendants,

SAMUEL R. ROSEN,

Objectant.

Upon the Supplemental Stipulation of Settlement dated December 24, 1959, entered into between Alleghany Corporation, objectant Samuel R. Rosen, and defendant Allan P. Kirby, and upon the affidavit of Charles T. Ireland, Jr. dated December 24, 1959 and upon the memorandum of this Court filed on March 12, 1959 (Owen McGivern, J.) approving the proposed settlement pursuant to the report of Robert J. Fitzsimmons, Referee, dated November 17, 1958, and upon all of the pleadings and proceedings heretofore had herein; and

It appearing that the order dated October 27, 1955 entered in the United States District Court for the South- [fol. 1208] ern District of New York in the action entitled Breswick & Co., et al. against Briggs, et al. (Civil Action No. 98-371) has been vacated as to the defendant Allan P. Kirby by order of the said United States District Court dated and entered December 24, 1959; and effective upon the filing in that Court of a copy of this Order; and

It further appearing from the Supplemental Stipulation of Settlement that said Supplemental Stipulation of Settlement preserves all of the benefits to Alleghany Corporation heretofore accepted by all plaintiffs in this action and approved by this Court in its memorandum dated March 12, 1959 and substantially adds to said benefits; and

It further appearing that objectant Samuel R. Rosen consents to and is a party to said Supplemental Stipulation of Settlement and consents to the entry of this order;

1. IT IS ORDERED: That the Supplemental Stipulation of Settlement be and the same hereby is approved; and it is further

2. ORDERED, that upon the payment by defendant Allan P. Kirby of $1,100,000 to Alleghany Corporation in accordance with the terms of the Supplemental Stipulation of Settlement a release in the form annexed to the Supplemental Stipulation of Settlement be executed by Alleghany

Corporation and delivered to defendant Allan P. Kirby; and it is further

3. ORDERED, that upon the aforesaid payment by Allan P. Kirby of $1,100,000 to Alleghany Corporation a judgment be entered herein severing and continuing this action as to all defendants other than Kirby dismissing on the merits and with prejudice the consolidated amended complaint herein as to defendant Allan P. Kirby but reserving [fol. 1209] all rights of Alleghany Corporation and its stockholders including plaintiffs herein, objectant Rosen and plaintiffs in the aforesaid Breswick action, against all other defendants named herein; provided, however, that nothing in this order releases nor shall operate as a release of defendant Allan P. Kirby from any obligation he has under the settlement approved by this Court on March 12, 1959, as affirmed by defendant Kirby in the Supplemental Stipulation of Settlement, or any modification of such settlement hereinafter ordered by this Court provided that no such modification shall operate to increase the obligations of defendant Kirby and it is further

4. ORDERED, that nothing in this order or done pursuant to it or pursuant to the Supplemental Stipulation of Settlement shall in any way be construed to release any claims or rights of Alleghany Corporation and its stockholders including plaintiffs herein, objectant Rosen and plaintiffs in the aforesaid Breswick action, against any defendant herein other than Allan P. Kirby, and all such claims and rights are reserved to said Alleghany Corporation and its stockholders including plaintiffs herein, objectant Rosen and plaintiffs in the aforesaid Breswick action; and it is further

5. ORDERED, that in the event judgment is recovered in any action or proceeding upon any cause of action or claim alleged in the consolidated amended complaint herein as to which defendant Kirby is jointly liable with one or more other defendants, the amount of the judgment on said

cause of action or claim shall be reduced by the proportionate share thereof which defendant Kirby would have been required to pay had he not entered into the Supplemental Stipulation of Settlement herein, and had all other [fol. 1210] defendants jointly liable for the judgment on said cause of action or claim paid their respective proportionate shares of such judgment in full; and it is further

6. ORDERED, that the judgment of dismissal as to defendant Allan P. Kirby provided for in paragraph 3 hereof shall provide for the reservation of jurisdiction of this Court for the purpose of enforcing any obligation of defendant Allan P. Kirby pursuant to paragraph 2a or 2b (as the case may be) of the Supplemental Stipulation of Settlement and for the purpose of enforcing paragraph 10 and all other provisions of the Supplemental Stipulation of Settlement, a copy of such Supplemental Stipulation of Settlement being attached hereto and made a part hereof, and defendant Allan P. Kirby having consented in open court upon the settlement of this order to the jurisdiction of this Court for the purpose of enforcing the aforesaid Supplemental Stipulation of Settlement and the provisions of this order.

7. ORDERED, that any party may apply to the court on three (3) days notice for the purpose of effectuating the aforesaid provisions.

Enter

/s/ O. McG.
J. S. C.

Filed

Dec. 28, 1959
New York
Co. Clerk's Office

[fol. 1211]

SUPPLEMENTAL STIPULATION OF SETTLEMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
Index No. 7244/1954

SADIE ZENN, *et al.*,

Plaintiffs,

against

J. J. ANZALONE, *et al.*,

Defendants,

SAMUEL R. ROSEN,

Objectant.

WHEREAS, on July 25, 1955, plaintiffs and defendants herein agreed in settlement of this action that the individual defendants herein would pay to defendant Alleghany Corporation the sum of $700,000 and other considerations; and

WHEREAS, by order entered in the United States District Court for the Southern District of New York (*Breswick & Co., et al* v. *Briggs*, Civil Action No. 98-371, hereinafter referred to as the "Breswick action") on October 27, 1955 the District Court enjoined the defendants therein from pleading as a defense therein any judgment resulting from the proposed settlement herein, but providing that any amount paid in settlement of this action should be applied in reduction of any judgment obtained in said Breswick action; and

[fol. 1212] WHEREAS, pursuant to order of this Court dated August 18, 1955, hearings were held before a Referee on the fairness and adequacy of said settlement of July 25, 1955; and

WHEREAS, Samuel R. Rosen, a stockholder of Alleghany, appeared by his undersigned counsel at said hearings and interposed objections to approval of the aforesaid settlement; and

WHEREAS, on June 22, 1956 defendants Murchison Brothers agreed in settlement of the action herein to deliver to Alleghany Corporation 130,000 shares of voting stock of Investors Diversified Services, Inc. (hereinafter referred to as IDS), in exchange for 130,000 shares of the Class A non-voting stock of said IDS; and

WHEREAS, on July 17, 1958, the individual defendants herein also agreed as part of the settlement of this action to pay to Alleghany Corporation the sum of $300,000 in addition to the cash and other considerations above-mentioned in the agreements dated July 25, 1955 and June 22, 1956 (said offers of July 25, 1955, June 22, 1956 and July 17, 1958 being collectively referred to hereinafter as the "Basic Settlement"); and

WHEREAS, plaintiffs herein have accepted said Basic Settlement as satisfactory to them and said objectant Rosen consents to accept this supplemental stipulation of settlement; and

WHEREAS, by opinion filed on March 12, 1959 this Court approved the aforesaid Basic Settlement embodied in the aforesaid offers of July 25, 1955, June 22, 1956 and July [fol. 1213] 17, 1958; but directed that until an order has been entered in the aforesaid Breswick action vacating the aforesaid injunctive order of October 27, 1955, no order upon said decision of this Court may be entered, except upon proof by affidavit of the happening of such event, and that then an order based upon said opinion of March 12, 1959 may be settled on notice; and

WHEREAS, by report dated November 17, 1958, a Special Master appointed by the United States District Court in the Breswick action reported to that Court recommending that by reason of the negotiations culminating in the

aforesaid offers and by reason of other events since October 27, 1955 the aforesaid District Court vacate its injunctive order of October 27, 1955; and

WHEREAS, by decision and order dated September 22, 1959, at the request of plaintiffs in the aforesaid Breswick action the aforesaid District Court rejected the aforesaid report of the Special Master and remitted to him for further hearings the question of the settlement value of the whole case in this and the District Court and the relation to the value of the aforesaid additional offers of June 22, 1956 and July 17, 1958;

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned as follows:

1. Defendant Kirby will pay the sum of $1,100,000 to Alleghany Corporation on or before December 31, 1959, provided that prior to 4:00 p.m. on December 30, 1959, the orders specified in (a) and (b) below are made and [fol. 1214] that simultaneously with the payment the release specified in (c) below is given:

(a) an Order in the aforesaid Federal District Court action (*Breswick & Co. et al.* v. *Briggs et al.*, Civil Action No. 98-371) vacating its order of October 27, 1955 therein as to defendant Kirby, so as to permit defendant Kirby to plead in bar of such action any judgment of this Court entered upon this supplemental stipulation of settlement and/or any release authorized by judgment or order of this Court.

(b) an Order of this Court herein approving this supplemental stipulation of settlement and directing that judgment be entered herein dismissing, with prejudice, the consolidated complaint herein as against the defendant Kirby, in accordance with the terms and conditions of this supplemental stipulation of settlement.

(c) the execution and delivery by defendant Alleghany Corporation to defendant Kirby of a release

in the form annexed hereto and as provided for in paragraph 7 hereof.

If the foregoing three events do not occur on or prior to the times and dates specified above, then and in that event this supplemental stipulation of settlement shall be null and void and defendant Kirby shall have no obligation to make the aforesaid payment of $1,100,000 or any other obligations hereunder.

[fol. 1215] 2. Defendant Kirby hereby affirms the Basic Settlement in addition to the obligations herein assumed by him.

2a. Defendant Kirby further agrees to be and remain bound by the Basic Settlement and perform his obligations thereunder in the event the Basic Settlement is eventually consummated.

2b. Failure to consummate the Basic Settlement, however, shall not affect in any way the judgment of dismissal and release of defendant Kirby provided that defendant Kirby shall have paid the aforesaid $1,100,000 and shall in addition pay the sum of $150,000 which defendant Kirby hereby agrees to pay in the event the Basic Settlement is not consummated; said agreement to pay $150,000 additionally shall survive the execution and delivery of the release referred to in paragraph 7 and elsewhere herein.

3. Nothing herein contained is intended to release any claims or rights of defendant Alleghany Corporation against any defendant other than defendant Kirby; any such claims and rights are hereby expressly reserved herein and the release to be given defendant Kirby as provided for herein shall contain an appropriate reservation of rights against all defendants other than defendant Kirby.

4. In the event judgment is recovered upon any cause of action or claim as to which defendant Kirby is jointly liable with one or more other defendants, the amount of

the judgment on said cause of action or claim shall be reduced by the proportionate share thereof which defen- [fol. 1216] dant Kirby would have been required to pay had he not entered into this supplemental stipulation of settlement, and had all other defendants jointly liable for the judgment on said cause of action or claim paid their respective proportionate shares of such judgment in full.

5. Neither this stipulation nor any proceedings thereunder shall be construed or deemed to be evidence or an admission on the part of defendant Kirby of any liability or wrongdoing whatsoever; neither shall they constitute a general or special appearance in the above-entitled action by defendant Kirby. The further offer of settlement evidenced in this supplemental stipulation of settlement is made without prejudice, and in the event that it is not consummated for any reason, it is understood that it shall not be offered in any proceeding, as evidence of settlement value or otherwise, for any purpose.

6. Alleghany Corporation and the undersigned agree with the defendant Kirby that the undertaking provided for in paragraphs 1 and 2 hereof shall constitute full and complete satisfaction and discharge of all claims alleged in the consolidated complaint herein as against defendant Kirby; and the undersigned agree and consent to the entry of an order (a) approving this supplemental stipulation of settlement, adjudging it fair, adequate and proper as to defendant Kirby and directing its consummation; and (b) further directing that defendant Alleghany Corporation upon payment by defendant Kirby of the sum of $1,100,000 as herein provided, shall make and deliver a general release to defendant Kirby in the form hereto annexed as Exhibit A; and (c) further directing that judgment be entered dismissing as against defendant Kirby [fol. 1217] all claims alleged in the consolidated complaint on the merits with prejudice against defendant Alleghany Corporation, its stockholders and its and their successors and assigns, but without prejudice to any rights or claims against other defendants herein.

7. Alleghany Corporation shall, upon the entry of an order of the Court herein dismissing the action herein, with prejudice, as against defendant Kirby, execute and deliver to defendant Kirby a release substantially in the form annexed hereto as Exhibit A.

8. Alleghany Corporation shall make available to counsel for the undersigned and to counsel for plaintiffs in the aforesaid Breswick action all documents in its possession or subject to its control that are relevant to the subject matter of the instant action and the said Breswick action.

9. This supplemental stipulation of settlement shall be submitted for approval to the Court herein promptly after its execution and the entry of the order referred to in paragraph 1(a) of this stipulation.

10. If the Court herein should fail or refuse to approve this supplemental stipulation of settlement on or before December 30, 1959, and to order by appropriate action the consummation thereof by such date, or if such order or judgment should be reversed on appeal, or if for any other reason it should be set aside, then and in any of these events this supplemental stipulation of settlement shall be and become null and void and of no further force and effect, and Alleghany Corporation shall promptly [fol. 1218] repay to defendant Kirby all payments theretofore made by him pursuant to this stipulation.

If the actions in the United States District Court for the Southern District of New York entitled *Breswick & Co. et al.* v. *Briggs, et al.* and *Zenn* v. *Anzalone,* and any other action presently pending involving the claims and causes of action against defendant Kirby that are alleged in the consolidated amended complaint herein, are not dismissed as to defendant Kirby upon appropriate proceedings therefor to be instituted promptly by defendant Kirby, then, upon the request of defendant Kirby, Alleghany Corporation will promptly repay to defendant Kirby all payments theretofore made by him pursuant to this stipulation, and this supplemental stipulation of settlement shall

thereupon become null and void and of no further force and effect, and any order or judgment entered pursuant hereto and any order vacating the order of October 27, 1955 as to defendant Kirby only and any judgment of dismissal as to defendant Kirby only in the Breswick action shall be vacated.

11. If the Basic Settlement is abandoned or if any parties thereto are permitted to withdraw therefrom prior to the payment by defendant Kirby pursuant to paragraph 1 [fol. 1219] hereof, then and in that event this stipulation shall be and become null and void and of no further force and effect.

Dated: December 24, 1959
New York, New York

s/ Graubard & Moskovitz
Graubard & Moskovitz
Attorneys for objectant Samuel R. Rosen

s/ Charles T. Ireland, Jr.
Charles T. Ireland, Jr.
Attorney for defendant Alleghany Corporation

s/ David Teitelbaum
David Teitelbaum
Attorney-in-Fact for defendant Allan P. Kirby

[fol. 1220] Exhibit A

Clerk's Note:

Exhibit A—"Release by Alleghany Corporation to Allan P. Kirby" is omitted from the record here. It is printed as Exhibit K-155-G folio 2387 **infra.**

[fol. 1223]

IN THE UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT No. 9

NOTICE OF ENTRY OF ORDER

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Index No. 7244/1954

SADIE ZENN, *et al.*,

Plaintiffs,

against

J. J. ANZALONE, *et al.*,

Defendants,

SAMUEL R. ROSEN,

Objectant.

SIRS:

PLEASE TAKE NOTICE that the within is a true copy of an order duly made and entered herein in the office of the Clerk of the Supreme Court, New York County, on the 29th day of December, 1959.

Dated: New York, N. Y.
December 30, 1959

Yours, etc.,

CHARLES T. IRELAND, JR.
Attorney for Defendant
Alleghany Corporation
Office & P. O. Address
230 Park Avenue
New York, New York

[fol. 1224]

ORDER

At a Special Term, Part I, of the Supreme Court, held in and for the County of New York, at the County Court House, in the Borough of Manhattan, City of New York, on the 29th day of December 1959.

Present—Honorable OWEN MCGIVERN, Justice

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Index No. 7244/1954

SADIE ZENN, *et al.*,

Plaintiffs,

against

J. J. ANZALONE, *et al.*,

Defendants,

SAMUEL R. ROSEN,

Objectant.

Upon the stipulation entered into in open court on December 24, 1959 in the United States District Court for the Southern District of New York before Honorable Edward J. Dimock, District Judge, in connection with an [fol. 1225] action therein pending entitled *Breswick & Co., et al.* v. *Briggs, et al.,* Civil Action No. 98-371 (hereinafter referred to as the Breswick action), between objectant Samuel R. Rosen herein, defendant Alleghany Corporation, and defendants Clint W. Murchison, Jr. and John D. Murchison, individually and doing business as Murchison Bros., Clint W. Murchison (hereinafter referred to collectively as the Murchison defendants) and the execu-

tors of the Estate of Sid W. Richardson (hereinafter referred to as Richardson Executors), and upon a related stipulation entered into at the same time, place and manner between objectant Samuel R. Rosen herein, defendant Alleghany Corporation, and defendant Anita O'Keeffe Young as executrix of the estate of Robert R. Young (hereinafter referred to as Young, Executrix or defendant Young), both stipulations relating to the disposition of this action upon the terms and conditions of settlement embodied in the settlement approved by this Court in its memorandum dated March 12, 1959 (hereinafter sometimes referred to as the Basic Settlement) and certain supplemental terms, both stipulations being hereinafter collectively referred to as the Second Supplemental Stipulation of Settlement, and

Upon the affidavit of Charles T. Ireland, Jr. dated December 26, 1959, and upon the memorandum of this Court filed on March 12, 1959 (Owen McGivern, J.) approving the Basic Settlement pursuant to the report of Robert J. Fitzsimmons, Referee, dated November 17, 1958, and upon all of the pleadings and proceedings heretofore had herein; and

[fol. 1226] It appearing that the order dated October 27, 1955 entered in the United States District Court for the Southern District of New York in the Breswick action has been vacated by order of the said United States District Court dated and entered December 24, 1959; and

It further appearing from the Second Supplemental Stipulation of Settlement that said Second Supplemental Stipulation of Settlement preserves all of the benefits to Alleghany Corporation heretofore accepted by all plaintiffs in this action and approved by this Court in its memorandum dated March 12, 1959 and substantially adds to said benefits; and

It further appearing that objectant Samuel R. Rosen consents to and is a party to said Second Supplemental Stipulation of Settlement and consents to the entry of this order;

1. IT IS ORDERED: That the report of Robert J. Fitzsimmons, Referee, dated November 17, 1958, be and the same is hereby approved and confirmed; and it is further

2. ORDERED, that the Second Supplemental Stipulation of Settlement be and the same hereby is approved, and the parties thereto are directed to take such steps as are necessary to fulfill as soon as is practicable the respective obligations undertaken therein and in the Basic Settlement; and it is further

3. ORDERED, that upon payment by said defendant Young of $900,000 to Alleghany Corporation, in accordance with her undertaking to pay such sum as set forth in the Second Supplemental Stipulation of Settlement and as directed in paragraph 2 of this Order, Alleghany Corpora- [fol. 1227] tion shall execute and deliver to her a release in the form hereto annexed, and judgment shall be entered herein, severing and continuing this action as to all defendants other than said defendant Young, and dismissing the consolidated amended complaint herein on the merits and with prejudice as to said defendant Young, but reserving all rights of Alleghany Corporation and its stockholders including plaintiffs herein, objectant Rosen and plaintiffs in the aforesaid Breswick action, against all other defendants named herein; provided, however, that nothing in this Order releases nor shall operate as a release of said defendant Young from any obligation she has under the Basic Settlement approved by this Court on March 12, 1959, as affirmed by her in the Second Supplemental Stipulation of Settlement, or any modification of such settlement hereinafter ordered by this Court; and provided that no such modification shall operate to increase the obligations of defendant Young, Executrix; and provided further that such judgment of dismissal as to Young, Executrix, shall reserve the jurisdiction of this Court for the purpose of enforcing the aforesaid obligations under the Basic Settlement approved by this Court on March 12, 1959; and it is further

3A. ORDERED, that Young, Executrix, may at her option, at any time prior to the granting of authorization by the probate court having jurisdiction over the Young estate for payment of the aforesaid $900,000, make such payment in escrow by paying it to Charles T. Ireland, Jr., as escrow agent, for delivery to Alleghany Corporation upon the receipt by Young, Executrix, of approval of the aforesaid probate court, and upon such payment in escrow being [fol. 1228] made, Alleghany Corporation shall execute and deliver to the escrow agent aforesaid the release referred to in paragraph 3 above, such release to be delivered to Young, Executrix, on payment of the $900,000 by the escrow agent to Alleghany Corporation; and upon delivery of said release to Young, Executrix by the escrow agent, a judgment shall be entered as provided in paragraph 3 hereof; and it is further

4. ORDERED, that upon the delivery to defendant Young, Executrix, of a release as provided in paragraph 3 or paragraph 3A hereof, a release in substantially the same form shall be executed and delivered by Alleghany Corporation to defendants Thomas J. Deegan, Jr., J. J. Anzalone, Frank B. Bateman, O. Henry Briggs, Walter W. Foskett, Henry J. Guild, Herman R. Neff, Brooks Potter, R. W. Purcell, Radcliffe Swinnerton, Andrew Van Pelt, Chesapeake Industries, Inc. and New York Central Railroad Company, and at the time of entry of judgment dismissing the action as to defendant Young, Executrix, pursuant to paragraph 3 or paragraph 3A hereof, a judgment containing the same provisions and reservations shall be entered dismissing the action as to defendant Thomas J. Deegan, Jr.; and it is further

5. ORDERED, that nothing in the foregoing provisions of this Order or done pursuant thereto or pursuant to the Second Supplemental Stipulation of Settlement shall in any way be construed to release any claims or rights of Alleghany Corporation and its stockholders, including plaintiffs herein, objectant Rosen and plaintiffs in the afore-

said Breswick action, against any defendant herein other [fol. 1229] than defendant Young and defendants Deegan, Anzalone, Bateman, Briggs, Foskett, Guild, Neff, Potter, Purcell, Swinnerton, Van Pelt, Chesapeake Industries, Inc. and New York Central Railroad Company, and all such claims and rights are reserved to said Alleghany Corporation and its stockholders, including plaintiffs herein, objectant Rosen and plaintiffs in the aforesaid Breswick action, except as hereinafter provided; and it is further

6. ORDERED, that in the event judgment is recovered in any action or proceeding upon any cause of action or claim alleged in the consolidated amended complaint herein as to which defendant Young, Executrix, and/or defendants Deegan, Anzalone, Bateman, Briggs, Foskett, Guild, Neff, Potter, Purcell, Swinnerton, Van Pelt, Chesapeake Industries, Inc. and New York Central Railroad Company, are jointly liable with one or more other defendants, the amount of the judgment on said cause of action or claim shall be reduced by the proportionate share thereof which defendants Young, Executrix, and/or Deegan, Anzalone, Bateman, Briggs, Foskett, Guild, Neff, Potter, Purcell, Swinnerton, Van Pelt, Chesapeake Industries, Inc. and New York Central Railroad Company, would have been required to pay had she not entered into the Second Supplemental Stipulation of Settlement herein or had they not been released pursuant hereto and had all other defendants jointly liable for the judgment on said cause of action or claim paid their respective proportionate share of such judgment in full; and it is further

7. ORDERED, that upon payment of the $1,000,000 to Alleghany Corporation in accordance with the settlement ap- [fol. 1230] proved by this Court on March 12, 1959, and the delivery of the agreement referred to as Exhibit A, and more particularly described in paragraph 2e of the stipulation of settlement dated July 25, 1955, releases in a form annexed hereto shall be executed by Alleghany Corporation and delivered to the Murchison defendants and the

Executors of the Estate of Sid W. Richardson, deceased, respectively, and a judgment shall be entered herein and severing and continuing this action as to all defendants other than said Murchison defendants and other than the Executors of the Estate of Sid W. Richardson, and dismissing on the merits and with prejudice the consolidated amended complaint herein as to said Murchison defendants and the Executors of the Estate of Sid W. Richardson, deceased, but reserving all rights of Alleghany Corporation and its stockholders, including the plaintiffs herein, objectant Rosen and plaintiffs in the aforesaid Breswick action, against all other defendants named herein, provided, however, that nothing in this order or release or judgment pursuant to this paragraph 7 releases nor shall operate as a release of Murchison Brothers from any other obligation which they or any of them have under the settlement approved by this Court on March 12, 1959 and affirmed by the Murchison defendants in the Second Supplemental Stipulation of Settlement, or any modification of such settlement hereinafter ordered by this Court provided that no such modification shall operate to increase their respective obligations thereunder; and provided further that any judgment entered pursuant to this paragraph 7 shall provide for a reservation of jurisdiction to enforce any other obligations of Murchison Brothers in the [fol. 1231] settlement approved by this Court on March 12, 1959, said defendants, notwithstanding the provisions of paragraph 14 of this order, having consented in open court upon the settlement of this order to the jurisdiction of this Court for the purpose of enforcing the aforesaid settlement approved by this Court on March 12, 1959, and the provisions of this order; and it is further

8. Ordered, that any payments to be made by the Murchison defendants and the Estate of Sid W. Richardson under the aforesaid Basic Settlement shall be made on or before the 31st day after entry of this order; and it is further

9. ORDERED, that defendant Young shall pay the $900,000 due from her under the Second Supplemental Stipulation of Settlement no later than (a) 20 days after entry of an order of the competent probate court approving such payment, or (b) such time as the payment of $1,000,000 under the Basic Settlement is made, whichever is later; and it is further

10. ORDERED, that nothing in the foregoing provisions of this order or done pursuant thereto or pursuant to the Second Supplemental Stipulation of Settlement shall in any way be construed to release any claims or rights of Alleghany Corporation and its stockholders, including plaintiffs herein, objectant Rosen and plaintiffs in the aforesaid Breswick action against any defendant herein other than the Murchison defendants and the executors of the Estate of Sid W. Richardson, deceased, and all such claims and rights are reserved to said Alleghany Corporation and its stockholders, including plaintiffs here-[fol. 1232] in, objectant Rosen, and plaintiffs in the aforesaid Breswick action, except as herein expressly provided; and it is further

11. ORDERED, that in the event judgment is recovered in any action or proceeding upon any cause of action or claim alleged in the consolidated amended complaint herein as to which either the Murchison defendants and/or the Executors of the Estate of Sid W. Richardson, deceased, or any of them, is jointly liable with one or more of the other defendants named herein, the amount of the judgment on such cause of action or claim shall be reduced by the proportionate share thereof which the Murchison defendants and/or the Executors of the Estate of Sid W. Richardson, deceased, or any of them, would have been required to pay had they not entered into the Second Supplemental Stipulation of Settlement herein and/or been released pursuant hereto, and had all other defendants jointly liable for the judgment on said cause of action or claim paid their respective proportionate shares of said judgment in full; and it is further

12. ORDERED, that defendant Murchison Brothers shall within one hundred (100) days of the entry of this order return to Alleghany Corporation 130,000 shares of the Class B (voting) stock of Investors Diversified Services, Inc. ("IDS") now owned by them in exchange for 130,000 shares of the Class A (non-voting) stock of IDS and defendant Murchison Brothers and Alleghany Corporation are directed to cooperate fully and to take all necessary and appropriate action to effectuate such exchange within such one hundred (100) days without prejudicing the rights and interests of IDS, and it is further

[fol. 1233] 12A. ORDERED that, to the extent permitted by law, Defendant Murchison Brothers and Alleghany Corporation shall use their best efforts to cause to be solicited and obtained for the April 1960 Annual Meetings of stockholders of IDS and the several underlying registered investment companies with which IDS now has investment advisory and underwriting contracts such proxies for the voting of the stocks of IDS and such registered investment companies as are necessary to effectuate this order and the terms of the Basic Settlement, it being the intent and understanding of defendant Murchison Brothers, Alleghany Corporation and the other parties hereto that defendant Murchison Brothers shall, to the extent permitted by law, use their best efforts to enable Alleghany Corporation to have nominees of its designation elected as directors of IDS and of such registered investment companies, respectively, at such Annual Meetings of stockholders, provided, however, that nothing herein contained shall be deemed to require Murchison Brothers to solicit proxies or to incur any expense in respect thereto.

13. ORDERED, that upon full compliance with the terms of the settlement approved by this Court on March 12, 1959 and with the terms of the Second Supplemental Stipulation of Settlement, and with the provisions of this order, Alleghany Corporation shall execute and deliver a

general release in the form annexed as Exhibit "B" to the Stipulation of Settlement dated July 25, 1955 filed herein running to each of the persons named in said form of release or their estates and a final judgment may be entered by any party to the action; and it is further

[fol. 1234] 14. Ordered, that neither the Second Supplemental Stipulation of Settlement nor any proceedings thereunder nor this order nor any proceeding nor action taken pursuant hereto shall be construed or deemed to be evidence or any admission on the part of the defendants or any of them of any liability or wrongdoing whatsoever; neither shall they constitute a general or special appearance in the above entitled action by any of the aforesaid defendants who have not heretofore appeared generally. The further offer of settlement evidenced in the Second Supplemental Stipulation of Settlement is deemed made without prejudice, and in the event that it is not consummated for any reason, it shall not be offered in any proceeding, as evidence of settlement value or otherwise, for any purpose; and it is further

15. Ordered, that if this order or any judgment pursuant hereto should be reversed on appeal, or if for any reason this order or any judgment pursuant hereto should be set aside or vacated, then and in any of these events, the Second Supplemental Stipulation of Settlement shall be and become null and void and of no further force and effect, and Alleghany Corporation shall promptly repay to any of the aforesaid defendants all payments theretofore made by any of the aforesaid defendants pursuant to the Second Supplemental Stipulation of Settlement and/or this order.

If the actions in the United States District Court for the Southern District of New York entitled *Breswick & Co., et al.* v. *Briggs, et al.*, and *Zenn* v. *Anzalone*, or any other action presently pending involving the claims and causes of action against the aforesaid defendants that are

[fol. 1235] alleged in the consolidated amended complaint herein, is not dismissed as to the aforesaid defendants upon appropriate proceedings therefor to be instituted promptly by such defendants, then, upon the request of any defendant from whom any consideration has passed to Alleghany Corporation pursuant hereto, Alleghany Corporation will promptly repay to any defendant so requesting all payments theretofore made by such defendant and thereupon the Second Supplemental Stipulation of Settlement shall become null and void and of no further force and effect as to such defendant, and any judgment of dismissal in the aforesaid Breswick action as a consequence of a judgment entered herein pursuant hereto or release given pursuant hereto shall be vacated as to such defendant; and it is further

16. Ordered, that Breswick & Co. and Myron Neisloss and Samuel R. Rosen, Clarence Bailey and Adelaide Neuwirth be and they hereby are permitted to intervene herein as parties for the purpose of enforcing the provisions hereof; and it is further

17. Ordered, that plaintiffs and their counsel and accountants, objectant Rosen and his attorneys, the Breswick plaintiffs and their attorneys, the financial consultant to the Breswick plaintiffs and objectant Rosen and all other attorneys for stockholders who may be entitled entered hereto for an allowance of expenses and reasonthereto may apply at the foot of the final judgment to be able counsel, accountants' and consultants' fees to be paid by Alleghany Corporation for services rendered to Alleghany Corporation and its stockholders in this Court and [fol. 1236] other forums with respect to the matters alleged in the Consolidated Amended Complaint herein, and Robert J. Fitzsimmons may apply to this Court for an allowance for his services as Referee herein and as Special Master in the United States District Court in the aforesaid Breswick action after the entry of this order; and it is further

18. Ordered, that any party may apply to the Court on three (3) days notice for the purpose of effectuating the aforesaid provisions of this order.

Enter,

/s/ O. McG.
J. S. C.

Filed
Dec. 29, 1959
New York Co. Clerk's Office

[fol. 1237] Clerk's Note

Attachment—"Release by Alleghany Corporation to Anita O'Keeffe Young as Executrix of the Estate of Robert R. Young, Deceased" is omitted from the record here. It is printed as Exhibit K-155-Q, folio 2393 infra.

[fol. 1239] Clerk's Note

Attachment—"Release by Alleghany Corporation to Clint W. Murchison, Jr. and John D. Murchison, Individually and doing Business as Murchison Brothers, and Clint W. Murchison, Sr." is omitted from the record here. It is printed as Exhibit K-155-H, folio 2389 infra.

[fol. 1241]

Release by Alleghany Corporation to John Connally, Perry Bass and Howell B. Smith as Executors of the Estate of Sid W. Richardson, Deceased

Know All Men by These Presents that Alleghany Corporation, a corporation organized and existing under the laws of the State of Maryland (hereinafter called "Alleghany"), in consideration of One Dollar ($1.00) and other

good and valuable consideration, receipt whereof is hereby acknowledged,

Pursuant to authority conferred upon it by the Supreme Court of the State of New York, County of New York (County Clerk's Index No: 7244/1954), and pursuant to a vote of its Board of Directors, does hereby remise, release and discharge John Connally, Perry Bass and Howell B. Smith as Executors of the Estate of Sid W. Richardson, deceased, of and from all claims, demands and causes of action of whatever kind or nature, whether at law or in equity, which against them have arisen, or now exist or may hereafter arise by reason of any of the matters and things alleged, referred to or embraced in the consolidated amended complaint heretofore served in an action entitled "Sadie Zenn, et al., Plaintiffs, against J. J. Anzalone, et al., Defendants," brought in the Supreme Court of the State of New York, County of New York (County Clerk's Index No. 7244/1954), or in the amended complaint served in an action entitled "Breswick & Co., et al. v. Briggs, et al." brought in the United States District Court for the Southern District of New York (Civil Action No. 98-371), or arising in any way out of the facts or transactions therein referred to.

By these presents Alleghany Corporation does not remise, release and discharge any persons other than John Conally, Perry Bass and Howell B. Smith as Executors [fol. 1242] of the Estate of Sid W. Richardson, deceased, from any of the foregoing and reserves all rights and claims against all persons other than John Conally, Perry Bass and Howell B. Smith as Executors of the Estate of Sid W. Richardson, deceased.

In the event judgment is recovered in any action or proceeding upon any cause of action or claims alleged in either of the aforesaid actions as to which John Conally, Perry Bass and Howell B. Smith as Executors of the Estate of Sid W. Richardson, deceased, are jointly liable wit

one or more other defendants, the amount of the judgment on said cause of action or claim shall be reduced by the proportionate share thereof which John Conally, Perry Bass and Howell B. Smith as Executors of the Estate of Sid W. Richardson, deceased, would have been required to pay had they not been released hereby and had all other defendants jointly liable for the judgment on said cause of action or claim paid their respective proportionate shares of such judgment in full.

In Witness Whereof, Alleghany Corporation has caused these presents to be executed in its name and behalf and its corporate seal to be hereunto affixed by its hereunto duly authorized, this day of 1960.

Alleghany Corporation

By: .....

[fol. 1243]

In the United States District Court

Plaintiffs' Exhibit No. 11

At a Special Term, Part I, of the Supreme Court, held in and for the County of New York, at the County Court House, in the Borough of Manhattan, City of New York, on the 1st day of February, 1960.

Present:

Hon. Owen McGivern,

Justice.

Index No. 7244/1954

SADIE ZENN, FREDA BLUMENTHAL, HENRY MENCHER, ABRAHAM L. FISTEL, JEANNETTE ANNENBERG, BERNARD LIEBERMAN, NICHOLAS SCHEPIS, JACOB HAIMOWITZ AND FRANCES KOENIG,

Plaintiffs,

—against—

J. J. ANZALONE
FRANK B. BATEMAN
O. HENRY BRIGGS
THOMAS J. DEEGAN, JR.
WALTER W. FOSKETT
HENRY J. GUILD
ALLAN P. KIRBY
HERMAN R. NEFF
CLINT W. MURCHISON
BROOK POTTER
R. W. PURCELL
SIDNEY W. RICHARDSON
RADCLIFFE SWINNERTON
ANDREW VAN PELT

ANITA O'KEEFE YOUNG, as Executrix under the Last Will and Testament of Robert R. Young, deceased,

CLINT W. MURCHISON, JR. and JOHN D. MURCHISON, individually and as partners, doing business under the firm name and style of MURCHISON BROTHERS,

CHESAPEAKE INDUSTRIES, INC., NEW YORK CENTRAL RAILROAD COMPANY and ALLEGHANY CORPORATION,

Defendants.

JUDGMENT OF DISMISSAL AS TO DEFENDANT ALLAN P. KIRBY

An Order having been made herein on December 28, 1959, approving the Supplemental Stipulation of Settlement dated December 24, 1959, and directing that upon the payment by defendant Allan P. Kirby of $1,100,000 to Alleghany Corporation and the execution and delivery to said [fol. 1244] Allan P. Kirby by Alleghany Corporation of a Release in the form annexed to the said Supplemental Stipulation of Settlement, judgment be entered dismissing the action as to defendant Allan P. Kirby and severing and continuing the action as to all other defendants; and

it appearing from the affidavit of Charles T. Ireland, Jr., dated January 28, 1960, annexed hereto, that the sum of $1,100,000 has been paid by defendant Allan P. Kirby to Alleghany Corporation and that the said Release has been executed by Alleghany Corporation and delivered to defendant Allan P. Kirby, and that all actions to be taken pursuant to the aforesaid Supplemental Stipulation of Settlement and Order prior to and as conditions for the entry of such judgment have been taken,

NOW, THEREFORE, on application of Donovan Leisure Newton & Irvine, attorneys for defendant Allan P. Kirby, and upon reading the Order of this Court filed on December 28, 1959 (Owen McGivern, J.) the aforesaid Supplemental Stipulation of Settlement and the affidavit of Charles T. Ireland, Jr., annexed hereto, it is

ADJUDGED AND DECREED that this action be, and the same hereby is, severed and continued as to all defendants other than Allan P. Kirby and that the complaint herein be, and the same hereby is, dismissed on the merits and with prejudice as to the defendant Allan P. Kirby but without prejudice to the rights of Alleghany Corporation and its stockholders against all other defendants named herein;

AND IT IS FURTHER ADJUDGED AND DECREED that in the event judgment is recovered in any action or proceeding upon any cause of action alleged in the consolidated amended complaint herein as to which defendant Kirby is jointly liable with one or more other defendants, the amount of the judgment on said cause of action or claim shall be reduced by the proportionate share for the judgment on [fol. 1245] said cause of action or claim paid their respective proportionate shares of such judgment in full;

AND IT IS FURTHER ADJUDGED AND DECREED that this Court reserves jurisdiction for the purpose of enforcing any obligation of defendant Allan P. Kirby pursuant to paragraph 2a or 2b (as the case may be) of the aforesaid Supple-

mental Stipulation of Settlement and for the purpose of enforcing all the other provisions of the Supplemental Stipulation of Settlement and the aforesaid Order.

ENTER,

s/ O. McG.
J.S.C.

s/ JAMES McGURRIN
Clerk

FILED
FEB. 4—1960
NEW YORK
Co. CLERK'S OFFICE

[fol. 1246]

IN THE UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT No. 17

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 98-371

BRESWICK & Co. and MYRON NEISLOSS, as stockholders of Alleghany Corporation and on behalf of themselves and al other stockholders similarly situated,

Plaintiffs,

—against—

O. HENRY BRIGGS, THOMAS J. DEEGAN, JR., WALTER W. FOSKETT, HENRY J. GUILD, ALLAN P. KIRBY, HERMAN R. NEFF, ANDREW VAN PELT, ROBERT R. YOUNG, CLINT W. MURCHISON, SID W. RICHARDSON, JOHN D. MURCHISON, CLINT W. MURCHISON, JR., MURCHISON BROTHERS and ALLEGHANY CORPORATION,

Defendants.

AMENDED COMPLAINT

Plaintiffs, for their amended complaint herein, by their attorneys, Rosston, Hort & Brussel, allege:

FIRST COUNT

1. This action arises under the Investment Company Act of 1940, Title 15, USCA § 80a-1, *et seq.*; 54 Stat. 789, and this Court has jurisdiction under Section 44, 15 USCA § 80a-43 of said Act.

[fol. 1247] 2. Plaintiffs bring this action on behalf of themselves as common stockholders and of other holders of the common stock of defendant Alleghany Corporation, (hereinafter called "Alleghany"), similarly situated. Said stockholders number 16,499 as of August 24, 1954, and it is therefore impracticable to bring them all before the court.

3. Plaintiffs are now and at the time of the transactions herein complained of were the owners and holders, beneficiary or of record, of 1100 shares of the common stock of defendant Alleghany. Plaintiff Breswick & Co. is a copartnership maintaining its office at 120 Walker Street, in the City of New York.

4. Plaintiffs sue herein both derivatively and on behalf of all other stockholders of their class.

5. Defendants O. Henry Briggs, Thomas J. Deegan, Jr., Walter W. Foskett, Henry J. Guild, Allan P. Kirby, Herman R. Neff, Andrew Van Pelt and Robert R. Young (hereinafter referred to as the "director-defendants") are, and were at the time of the transactions herein complained of, directors of Alleghany; and defendants Young, Kirby and Deegan are and were at the time of the transactions herein complained of, Chairman, President and Vice-President, respectively, and members of the Executive Committee of defendant Alleghany. Said defendants now constitute and at the time of the transactions herein complained of, constituted all the members of the Board of defendant Alleghany except that one J. J. Anzalone was a director of defendant Alleghany until February, 1954, and except

[fol. 1248] further that defendant Deegan became a director of defendant Alleghany in February 1954 after said Anzalone resigned as such director.

6. Defendant Alleghany was incorporated in the State of Maryland on January 26, 1929, and exists under the laws of that State. Its main offices are, and at the time of the transactions complained of, were maintained at 4500 Chrysler Building, New York City.

7. From at least January 19, 1954, to date defendant Alleghany had outstanding the following capital securities of which it is the issuer: $15,200,000 Bank Notes due 1955-1956; $7,496,000 5% Debentures due November 1, 1962; 25,845 shares of $4 Prior Preferred Convertible Stock; 136,744 Shares of 5½% Series A, Preferred Stock; 4,637,797 Shares of $1 Par Value Common Stock; and $2,000,000 Perpetual Warrants to purchase common stock at $3.75 per share.

8. Defendant Alleghany is engaged, and from January 19, 1954 to date held and now holds itself out as being engaged primarily, and proposed during said time and now proposes to engage primarily, in the business of investing, re-investing and trading in securities.

9. Defendant Alleghany from January 19, 1954 was engaged and proposes to engage, and is engaged and proposes to engage, in the business of investing, re-investing, owning, holding and trading in securities, and owns and proposes to acquire investment securities having a value [fol. 1249] exceeding forty (40%) per centum of the value of such issuer's total assets (exclusive of Government securities and cash items) on an unconsolidated basis.

10. From January 19, 1954, to date, by reason of the above facts, defendant Alleghany was and is an "investment company" as that term is defined in and by Section 3(a) of the Investment Company Act of 1940, 15 USCA § 80a-3(a).

11. The acts and transactions constituting the violations hereinafter complained of occurred in whole or in part within the Southern District of New York.

12. All of the defendants herein transact business within the Southern District of New York.

13. From November 1, 1940 to October 4, 1945, defendant Alleghany was an investment company registered with the Securities and Exchange Commission (hereinafter called "S. E. C.") under said Investment Company Act.

14. By order entered on June 5, 1945, in Finance Docket Number 14692, the Interstate Commerce Commission (hereinafter called "I. C. C.") approved and authorized the acquisition by defendant Alleghany of control of the Chesapeake & Ohio Ry. Co. (hereinafter called "C & O"), the New York, Chicago & St. Louis R. R. Co., and the Pere Marquette Ry. Co., and their subsidiaries and affiliates, and directed that "unless and until otherwise ordered Al- [fol. 1250] leghany shall be considered as a carrier subject to the provisions of Section 20 (1) to (10), inclusive, and Section 20 (a) (2) to (11), inclusive, of the Interstate Commerce Act, to the same extent that those provisions are applicable to the Chesapeake & Ohio Railway Co. and its carrier subsidiaries and affiliates". During the year 1947 Alleghany and C & O divested themselves of control of New York, Chicago & St. Louis Railroad Co. and its subsidiaries and affiliates, and the Pere Marquette Railway Co. was merged into the C & O.

15. Section 3 (c) (9) of the Investment Company Act, 15 USCA § 80a-3(c)(9), excerpts from the definition of an investment company "any company subject to regulation under the Interstate Commerce Act."

16. On October 4, 1945, the S. E. C. on the basis of the facts set forth in Paragraphs Nos. 14 and 15 above, declared in its Findings, Opinion and Order (20 S. E. C. 731) that defendant Alleghany "has ceased to be and is not now an investment company within the meaning of the

Investment Company Act of 1940" and ordered the termination of defendant Alleghany's registration under said Act.

17. At said times and thereafter, to date, defendant Young was Chairman of the Board and defendant Kirby was President, and both were directors of defendant Alleghany and members of its Executive Committee, and continued to act in said capacities, and by reason of these positions, their ownership of voting stock of defendant [fol. 1251] Alleghany and their nomination, sponsorship and business relations with the six other members of defendant Alleghany's Board of Directors, denominated its Board and Executive Committee and controlled defendant Alleghany, and continues so to do.

18. Between December 1, 1953 and June 14, 1954, defendants Young and Kirby, and defendants Clint W. Murchison, Clint W. Murchison, Jr., John D. Murchison and Murchison Brothers (hereinafter identified as the "Murchison Group"), defendant Richardson, and defendant Alleghany acting by and through the director-defendants, conspired and agreed to acquire 1,000,000 shares of the capital stock of New York Central Railroad Company (hereinafter referred to as "Central") for the personal account of defendants Young, Kirby, Richardson and the Murchison Group and to utilize the funds, resources, credit, personnel and facilities of defendant Alleghany to acquire control of Central for the purpose, among others, of enhancing the value of stock of Central thus personally acquired by said defendants, with intent that no part of such enhancement was to inure to defendant Alleghany or its stockholders; and during said periods defendants Young and Kirby, and defendant Alleghany acting by and through the director-defendants further conspired and agreed with the Murchison Group to cause defendant Alleghany to transfer to the Murchison Group and its nominees valuable assets and property of defendant Alleghany including, among others, a minimum of 20% voting control of Investors Diversified

Services, Inc. (hereinafter called "I. D. S.") with the in-
[fol. 1252] tent to induce the Murchison Group to permit themselves to be used as a vehicle to aid defendants Young and Kirby to obtain control of Central with the use of the resources, credit, personnel and facilities of defendant Alleghany. During said period, and for the purpose of facilitating the aforesaid conspiracy, all of the individual defendants and defendant Alleghany acting by and through the director-defendants, further conspired and agreed to cause defendant Alleghany to refrain from complying with the provisions of the Investment Company Act by failing to register thereunder with the S. E. C. and otherwise causing it to comply with the provisions of said Act.

19. In pursuance of said conspiracy and as part thereof, and to effectuate its objectives, the individual defendants participated in said conspiracy by the following overt acts, each of which occurred in whole or in part within the Southern District of New York, and each of which was an integral part of said conspiracy:

(1) In December, 1953, defendants Young and Kirby purchased 200,000 shares of the common stock of Central for their own account.

(2) During December, 1953, the director-defendants other than defendant Deegan, caused defendant Alleghany to sell to defendant Murchison Brothers, a partnership consisting of defendants John D. Murchison and Clint W. Murchison, Jr., and dominated or controlled by their father, defendant Clint W. Murchison, 5650 shares of the Class A Common and 27,500 shares of the Voting Common, or a [fol. 1253] total of twenty (20%) per centum of the Voting Stock of I. D. S., a face-amount certificate investment company registered with S. E. C. under the Investment Company Act, and managing a system of eight investment companies, including itself, with combined assets of $1,000,000,000 and more than 500,000 security holders.

(3) In consideration of defendant Clint W. Murchison's aid in said conspiracy as herein described, the director-defendants other than defendant Deegan, caused defendant Alleghany to waive cash payment for said I. D. S. securities at the time of said sale, and to accept payment therefor in the form of 4% notes due over a period of five years.

(4) On January 19, 1954, the director-defendants, other than defendant Deegan, caused defendant Alleghany to divest itself of control of C & O and its carrier affiliates and subsidiaries.

(5) On or about February, 1954, the director-defendants caused defendant Alleghany and others to lend to defendants Clint W. Murchison and Richardson a total of $20,000,000 of which $7,500,000 was loaned by defendant Alleghany, to enable said borrowers to buy 800,000 shares of Central owned by C & O, and to vote proxies for said 800,000 shares for the election to the board of directors of Central of defendants Young, Kirby, Clint W. Murchison, Richardson and eleven other nominees of said defendants.

(6) At the same time the director-defendants caused defendant Alleghany to grant defendants Clint W. Murchi- [fol. 1254] son and Richardson the right to sell 300,000 of said Central shares to defendant Alleghany between July 15, 1954 and September 15, 1954, at $25 a share.

(7) On July 15, 1954, the director-defendants caused defendant Alleghany to purchase from defendants Clint W. Murchison and Richardson an aggregate of 300,000 shares of Central stock at a price of $25 a share, or a total of $7,500,000, and caused the Murchison Group and defendant Richardson to sell to defendant Kirby an additional 200,000 Central shares at $25 a share, and at the same time, and in connection with said sales, the director-defendants caused defendant Alleghany to loan defendants Clint W. Murchison and Richardson $3,750,000 each.

(8) At the same time the director-defendants caused defendant Alleghany to enter into separate agreements with

defendants Murchison Brothers and Richardson, pursuant to which a total of 600,000 shares of Central were placed in joint ventures with said defendants and defendant Alleghany, and under which fifty (50%) per centum of the profit of said shares was and is to be paid to said defendants Murchison Brothers and Richardson.

(9) In December, 1954, the director-defendants caused defendant Alleghany to sell defendants Murchison Brothers 45,000 shares of the Voting Common stock of I. D. S. for $2,981,250, and to enter into a contract to sell in 1955 another 55,000 shares for an aggregate price of $4,706,250, upon the security of a collateral promissory note of the buyer in said sum, and to exchange 130,00 shares of the [fol. 1255] Voting Common Stock of I. D. S. for 130,000 shares of its non-voting Class A stock.

(10) At or about the time of the acts set forth in (9), the director-defendants caused defendant Alleghany to obtain from defendants Murchison Brothers and Richardson transferable options to purchase 45,000 shares of Central at $25 a share, 45,000 shares at $30 a share, and 45,000 shares at $35 a share.

(11) From January 19, 1954, to at least January 1, 1955, the director-defendants caused defendant Alleghany to sell non-railroad securities in its portfolio at substantial losses to defendant Alleghany of income and profit for the purpose of making it appear that defendant Alleghany was not in truth and in fact an investment company subject to the Investment Company Act of 1940, and was not subject to registration thereunder, and to enable defendant Alleghany to claim that it was subject to regulation only by the I. C. C.

(12) On or about January 19, 1954 and until about June 14, 1954, the director-defendants caused defendant Alleghany to use its facilities and personnel and to expend, in the form of loans to defendants Young, Kirby, Clint W. Murchison, Richardson, and their nominees, approximately

$1,369,775 in connection with their contest for control of Central and for the solicitation of proxies from the stockholders of Central. Said expenditures were made to procure the election of defendants, Young, Kirby, Clint W. Murchison, Richardson and other nominees of said defendants as directors and officers of Central, to defeat the campaign of the opponents of said defendants in said election [fol. 1256] and to oppose actions and proceedings instituted by said opponents in the Supreme Court of the State of New York and before the Interstate Commerce Commission for injunctions and other relief with respect to said proxy solicitation, and thereby to effect control of Central so as to enable said defendants to cause Central to adopt policies, and to appoint personnel of Central, for the purpose of increasing the value of said defendants' personal investments, none of which increase accrued nor was intended to accrue to the stockholders of Alleghany.

(13) The director-defendants caused defendant Alleghany to refrain from registering with S. E. C. as an investment company and from applying to S. E. C. for approval of said loans or expenditures, as required by law.

(14) From December 1, 1953 until June 14, 1954 while the market price of Central stock was rising as a result of the above acts and expenditures and thereby increasing the value of defendants Young and Kirby's personal holdings of 200,000 shares, the director-defendants caused defendant Alleghany to limit its acquisition of Central stock to 11,400 shares of Central.

20. As a result of the divestments referred to in paragraphs 14 and 19(4) above, and after January 19, 1954 defendant Alleghany ceased to be lawfully subject to regulation by the I. C. C. under the Interstate Commerce Act, and was in fact and in law no longer a carrier subject to any of the provisions of said Act.

[fol. 1257] 21. On January 19, 1954, as a result of said divestments, said I. C. C. order of June 5, 1945 automatically expired and no longer had any legal force or effect.

22. On January 19, 1954, as a result of said divestments, defendant Alleghany became an investment company within the meaning of Section 3(a)(1) and (3) of the Investment Company Act, 15 USCA § 80a-3(a)(1)(3), and the exception made by Section 3(c)(9) of said Act, 15 USCA § 80a-3(c)(9), ceased to be applicable to it.

23. On and after January 19, 1954, and until at least January 1, 1955, the director-defendants were required to cause defendant Alleghany to register with the S. E. C. under Section 8 of the Investment Company Act, 15 USCA § 80a-8, and to conform its activities to the requirements of said Act, or to cause it to obey Section 7(a) of said Act, 15 USCA § 80a-7(a) and cease all corporate activity in interstate commerce as therein set forth.

24. In violation of said duties and liabilities the director-defendants failed to cause defendant Alleghany either to register under said Act, or to conform its activities to the requirements of said Act, or to cease all corporate activity in interstate commerce or otherwise to comply with the requirements of Section 7(a) of said Act, 15 USCA § 80-a-7(a).

25. The aforesaid acts and omissions of said defendants and defendant Alleghany were not in good faith, nor in conformity with the S. E. C. Findings, Opinion and Order of October 4, 1945 but were motivated by the objects and [fol. 1258] purposes of said conspiracy, as aforesaid, and defrauded the stockholders of defendant Alleghany of the rights and the protection inuring to defendant Alleghany and its stockholders under the Investment Company Act and enabled defendants illegally to use the credit, resources, personnel and facilities of defendant Alleghany to procure for themselves positions as officers and directors of Central, and to enhance the income and value of their personal holdings of Central stock and to appropriate said enhancement for themselves instead of for the benefit of Alleghany and its stockholders.

26. The Investment Company Act was enacted, as set forth in Section 1(b)(2), 15 USCA § 80a-1(b)(2), to prevent such exploitation and to preserve for the stockholders of an investment company the profits and rights accruing from the use of its funds, resources, credit, personnel, and facilities.

27. The expenditures and loans referred to in 19(12) were and are prohibited by Section 7(a) and Section 17(a)(3) and Section 21(b) of the Investment Company Act, 15 USCA §80a-7(a), 17(a)(3), 21(b), and the contracts of purchase and sale referred to in paragraphs 19(6), (7), (8), (9), (10) and (11) above were and are prohibited by Sections 7(a) and 47(b) 15 USCA §80a-7(a), 46(b) of said Act.

28. It was an essential part of said conspiracy that defendants would contend that defendant Alleghany continuously and from January 19, 1954, to at least January 1, [fol. 1259] 1955, was subject to regulation by the I. C. C., pursuant to the order of June 4, 1945, although defendants knew that the basis of such order no longer existed by reason of the divestments of control hereinabove recited, and that defendant Alleghany was in truth and in fact a non-carrier corporation from January 19, 1954 to at least January 1, 1955.

29. (a) By reason of the transactions above described, Central and I. D. S. and defendants Young, Kirby, Murchison Brothers, Clint W. Murchison, Clint W. Murchison, Jr., John D. Murchison and Richardson were and are "affiliated persons" of Alleghany and/or I. D. S. as defined in Section 2(a)(3) of the Investment Company Act, 15 USCA § 80a-2(a)(3).

(b) The transactions, loans and purchases and sales of securities above described were prohibited to registered investment companies and their directors and affiliated persons by Section 17(a)(1), (2) and (3) and by Section 21(b) of the Investment Company Act, 15 USCA § 80a-17(a)(1),

(2), (3), 24(b); and by reason of defendants' failure to register defendant Alleghany under said Act, as aforesaid, have resulted in profits of more than $7,000,000 and additional earnings, dividends and other emoluments and prerequisites of control of Central and I. D. S. accruing to the benefit of the individual defendants instead of defendant Alleghany and its stockholders as intended and contemplated by the Investment Company Act, and in the loss by defendant Alleghany of profits, moneys, control of I. D. S. and other assets which would otherwise have inured to and been retained by it.

[fol. 1260] 30. Any effort by plaintiffs to secure appropriate action by defendant Alleghany's board of directors or stockholders to enforce the causes of action alleged in this amended complaint would be futile by reason of the circumstance that all the members of said Board are charged as defendants herein and could not be expected either to institute or to prosecute this action in good faith, and by reason of the further circumstance that under the laws of Maryland the stockholders are without power to direct the defendant Alleghany to cause this action to be instituted.

31. This action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction.

SECOND COUNT

32. Plaintiffs repeat each and every allegation contained in the First Count.

33. By reason of the facts above alleged, Alleghany is presently an investment company within the meaning of Section 3(a) of the Investment Company Act, 15 USCA § 80a-3(a), and, as such, is required to register with S. E. C. under said Act.

THIRD COUNT

34. Plaintiffs repeat each and every allegation contained in the First and Second Counts.

[fol. 1261] 35. On January 14, 1955, defendants Young, Kirby, Briggs, Deegan, Foskett, Guild, Neff and Van Pelt caused Alleghany to announce an Exchange Offer to holders of its Series A Preferred Stock, pursuant to which each such holder would receive 10 shares of a proposed issue of new 6% Convertible Preferred stock of defendant Alleghany for each share of Series A 5% Preferred stock surrendered therefor.

36. Pursuant to said Exchange Offer, the holders of said Convertible Preferred stock would have the absolute right to elect two directors of defendant Alleghany; the present number of such directors would be increased to ten (10), six (6) of whom would be elected by holders of three classes of Alleghany's preferred stock and 50% control of Alleghany would be lost by the holders of the common stock. In addition said Convertible Preferred stock would be convertible into shares of Alleghany Common stock, the precise number of which is to be determined at the date the Exchange Offer is closed, upon a cash payment of $3.75 per common share, although the net asset value per share of common stock was $7.09, as of December 21, 1954.

37. If said stock issue, Exchange Offer and conversion be consummated, the equity and voting rights of the common stockholder in defendant Alleghany will be substantially diluted.

38. In anticipation of said Plan and prior to its publication, defendant Young increased his personal holdings of said Series A Preferred Stock from 5,179 shares, as of April 8, 1954, to 11,087 shares as of December 1, 1954.

[fol. 1262] 39. Defendants Young, Kirby, Briggs, Deegan, Foskett, Guild, Neff and Van Pelt propose to obtain the approval of said plan by the I. C. C. and do not intend to submit it to the S. E. C. for determination with respect to its compliance with the standards of the Investment Company Act.

40. Said acts of said defendants contravene the provisions of the Investment Company Act, and deprive the

common stockholders of substantial rights under Sections 18(c) and 25(b) of the Investment Company Act, 15 USCA § 80a-18(c), 25(b).

41. The conversion provisions of said Exchange Offer confer upon the holders of the proposed Convertible stock a warrant or right to subscribe to the Common Stock of defendant Alleghany by exchanging said Convertible stock for common stock of defendant Alleghany, plus the cash amount above specified. In addition, defendant Alleghany, under the Exchange Offer, will be precluded from redeeming its Convertible Preferred stock prior to May 1, 1970.

42. The issuance of said warrant or right to subscribe to the common stock of defendant Alleghany for a minimum period of at least 15 years in the form of said Convertible Preferred stock is in violation of Section 18(c) of the Investment Company Act, 15 USCA § 80a-18(d).

43. By reason of the failure of Alleghany to register under the Investment Company Act and to apply to S. E. C. for approval of said proposal, the issuance of said Convertible Preferred stock of Alleghany and the exchange [fol. 1263] thereof for Series A Preferred Stock of Alleghany, and the issuance of said rights to subscribe for the common stock of Alleghany, the rights of Alleghany and its present security holders, including the holders of its Common Stock, will be seriously and irreparably damaged and prejudiced.

FOURTH COUNT

44. Plaintiffs repeat each and every allegation contained in the First and Second Counts.

45. In December, 1954, the director-defendants caused defendant Alleghany to sell defendants Murchison Brothers 45,000 shares of the Voting Common stock of I. D. S. for $2,981,250, and to enter into a contract to sell in 1955 another 55,000 shares for an aggregate price of $4,706,250, upon the security of a collateral promissory note of the buyer in said sum, and to exchange 130,000 shares of the

Voting Common of I. D. S. for 130,000 shares of its non-voting Class A stock.

46. By reason of the matters and things aforesaid, if said executory agreement for the transfer of the I. D. S. voting stock referred to in paragraphs 19(2) and 45 is consummated, there will be an automatic termination of all investment advisory contracts held by I. D. S., as a result of the operation of Sections 2(a) (4) and 15(a) (4) of the Investment Company Act, 15 USCA § 80a-2(a)(4), 15(a) (4).

[fol. 1264] 47. Said investment advisory contracts are among the largest sources of revenue of I. D. S. and constitute one of its chief assets.

48. Such cancellation will tend to destroy the investment value of the I. D. S. stock now held by defendant Alleghany and will adversely affect the rights and equities of Alleghany and its stockholders with respect thereto.

FIFTH COUNT

49. Plaintiffs repeat each and every allegation contained in paragraphs 2 through 31, inclusive.

50. Plaintiffs are citizens of the State of New York; defendant Alleghany is a corporation incorporated under the laws of the State of Maryland; defendants Briggs and Guild are citizens of the State of Massachusetts; defendant Kirby is a citizen of the State of New Jersey; defendant Neff is a citizen of the State of Ohio; defendant Deegan is a citizen of the State of Connecticut; defendant Van Pelt is a citizen of the State of Pennsylvania; defendant Young is a citizen of the State of Rhode Island; defendants Clint W. Murchison, Murchison Brothers, Clint W. Murchison, Jr., John D. Murchison and Richardson are citizens of the State of Texas.

51. This cause of action is founded on diversity of citizenship, and the amount in controversy exceeds, exclusive of interest and costs, the sum of $3,000.

[fol. 1265] 52. Assuming that said order of the I. C. C. dated June 5, 1945 continued to confer carrier status upon defendant Alleghany under Section 5(3) of the Interstate Commerce Act, after January 19, 1954, the director-defendants had the right to elect to apply to I. C. C. for a vacatur of said order and to register defendant Alleghany with the S. E. C. under Section 8 of the Investment Company Act, 15 USCA 80a-8, and to cause defendant Alleghany to conform its activities to the requirements of said Act, thereby according to the stockholders of Alleghany the valuable rights and protection accruing to stockholders of companies registered under the Investment Company Act.

53. Nevertheless after January 19, 1954 the director-defendants elected to cause defendant Alleghany to continue to refrain from applying to I. C. C. for a vacatur of said order of June 5, 1945, and from registering with S. E. C. under said Section 8 of the Investment Company Act and to continue to claim the benefit of Section 3(c)(9) of the Investment Company Act, 15 USCA 80a-3(c)(9), and to continue to assert carrier status for defendant Alleghany under Section 5(3) of the Interstate Commerce Act.

54. The acts and conduct of the director-defendants referred to in paragraph 53 were not taken pursuant to the exercise of their unbiased business judgment as directors of defendant Alleghany, acting solely in the interests of Alleghany's stockholders and for their sole benefit, but, on the contrary, were motivated by the purposes and objects of said conspiracy, that is, the pecuniary and other personal [fol. 1266] advantages, including election as Chairman and directors of Central, derived and to be derived by defendants Young, Kirby, Clint W. Murchison, Clint W. Murchison, Jr., John D. Murchison, Murchison Brothers and Sid W. Richardson. Said transactions and personal dealings with defendant Alleghany, as set forth in paragraphs 18 and 19, would have violated the provisions of said Investment Company Act including the provisions of those Sections of said Act referred to in paragraph 27.

55. By reason thereof the acts and conduct of the director-defendants referred to in paragraph 53 contravened the duties and obligations owed to defendant Alleghany by the director-defendants as directors, controlling stockholders and fiduciaries of defendant Alleghany, and the stockholders of Alleghany Corporation have been deprived of the valuable rights and protection accorded stockholders of companies registered under the Investment Company Act.

56. By reason thereof defendants Young, Kirby, Richardson and Murchisons obtained or made available to themselves realizable market profits on Central stock and other benefits in a sum in excess of $8,000,000, and also have deprived Alleghany of profits in excess of $6,000,000 which would have been available to it on other securities had they not been sold in order to accomplish the conspiracy herein set forth, the precise amount of said profits being ascertainable only upon the trial of this action.

[fol. 1267] SIXTH COUNT

57. Plaintiffs repeat each and every allegation contained in paragraphs 2 through 6, inclusive, 17, 18, 19, 30, 31, 50 and 51.

58. Since its incorporation, defendant Alleghany has been and continues to be engaged in the business of investing and re-investing and trading in securities.

59. By reason of the matters and things aforesaid, assets, funds, credit and facilities of Alleghany in excess of $1,000,000 have been wasted and dissipated by the individual defendants.

60. The acts and conduct of the director-defendants referred to in paragraphs 18 and 19 contravene the duties and obligations owed to defendant Alleghany by the director-defendants as directors, controlling stockholders, and fiduciaries of defendant Alleghany, and were not taken pursuant to the exercise of their unbiased business judg-

ment as directors of defendant Alleghany, acting solely in the interests of Alleghany's stockholders and for their sole benefit but, on the contrary, were motivated by the purposes and objects of said conspiracy, that is, the pecuniary and other personal advantages, including election as Chairman and directors of Central, derived and to be derived by defendants Young, Kirby, Clint W. Murchison, Clint W. Murchison, Jr., John D. Murchison, Murchison Brothers and Sid W. Richardson.

[fol. 1268] 61. By reason of the matters and things aforesaid, defendants Young, Kirby, Clint W. Murchison, Clint W. Murchison, Jr., John D. Murchison, Murchison Brothers and Richardson have acquired, and the director-defendants have suffered and permitted the other individual defendants to acquire, assets, funds and business opportunities belonging and otherwise available to defendant Alleghany, and within the scope of its business activities and corporate powers, having a value in excess of $13,000,000, the precise nature and extent of which can be ascertained only upon a trial of this action.

Seventh Count

Against Defendants Briggs, Deegan, Foskett, Guild, Kirby, Neff, Van Pelt, Young and Alleghany Corporation

62. Plaintiffs repeat each and every allegation contained in paragraphs 2 through 10, inclusive, 13 through 17, inclusive, 30, 31, 50 and 51.

63. From at least November, 1946 to January 1, 1955, defendants Young and Kirby have taken for their own personal or family account and profit, divers investments which it was their duty and obligation as investment managers of defendant Alleghany to take for the account of said defendant.

64. Among such investments were various kinds of securities in enterprises owning or controlling shopping

centers located at Edmonton, Province of Alberta, Canada, [fol. 1269] and elsewhere; and shares of various classes of preferred stock of defendant Alleghany, which were purchased at discounts from their redemption or liquidating values, said purchases having been made prior to announcement by defendant Alleghany that it would retire said stocks by purchase or exchange of assets or securities with a then actual or a then prospective higher market value than the market value prevailing at the time of said purchases.

65. From at least November 1946 and until the commencement of this action, defendant Young and his wife Anita have owned 20% or more of the voting stock of Chesapeake Industries, Inc., (hereinafter called "Chesapeake"), and defendant Kirby, directly or indirectly through his family interests, has been for the last several years the largest creditor of said company. Chesapeake is a corporation organized under the laws of Ohio, which maintains its principal office upon the premises of the defendant Alleghany at 4500 Chrysler Building, New York City, but in which Alleghany owns no financial interest. From 1946 to 1950 the Chairman and Vice-President of Chesapeake were Robert W. Purcell and J. J. Anzalone, then Vice-Presidents of defendant Alleghany, and the President was Kenneth M. Young, brother of defendant Young; since 1950 its President and chief executive has been and is one William C. MacMillen, Jr., to whom defendant Young has delegated various responsibilities with respect to Alleghany's activities and personnel. From 1946 to 1954 a majority of the directors of Chesapeake included said Purcell, MacMillen, Kenneth M. Young, Anzalone, Charles Shipman, President of a financial service in the [fol. 1270] employ of defendant Alleghany; defendants Van Pelt and Guild, directors of Alleghany; William R. Daley, Vice-President of Portsmouth Steel Corporation in which defendant Alleghany owned during all or part of said time a $3,000,000 stock interest, Donald M. Carter, personal representative of the Murchison defendants herein with whom defendant Alleghany has engaged and continues to engage

in multi-million dollar joint ventures and other enterprises, and other persons employed or formerly employed by Alleghany.

66. By reason of the facts above alleged Young and Kirby dominate and control Chesapeake.

67. At various times since plaintiffs became stockholders of defendant Alleghany, Chesapeake has taken for its corporate account and profit (and therefore indirectly for the benefit and profit of defendants Young and Kirby) investments and business opportunities which it was the duty and obligation of defendants Young and Kirby, as investment and business managers and fiduciaries of defendant Alleghany, to take for the account of defendant Alleghany.

68. Among such investments were purchases of or acquisitions of investments in The Colonial Trust Company, of New York City; Virginia Metal Products, Inc., of Orange, Virginia; The Allen Cardwell Electronics Productions Corp., of Plainville, Connecticut; National Transitads, Inc., of New York City; Intercoast Petroleum Inc., of Midland, Texas; Oils & Industries, Inc. of Maryland; Home & For- [fol. 1271] eign Securities Corp. of Maryland; Intercontinental Holdings, Ltd.; and Chesapeake Printing Corp., both of New York City, the precise nature and extent of which are presently not ascertainable.

69. Upon information and belief, all of said investments were profitable or otherwise advantageous to Chesapeake, and that Chesapeake derived profits and other pecuniary benefits therefrom in excess of $3,000, the precise amount of which can be ascertained only upon the trial of this action.

70. All of the investments of Chesapeake above referred to were within the scope of the business of defendant Alleghany and were authorized by its certificate of incorporation, and defendant Alleghany was and is financially able to acquire same; and defendants Young and Kirby were and are obligated to offer said investment opportunities to defendant Alleghany in the first instance and thereafter to

refrain from interfering with the acquisition of said investments by Alleghany.

71. Defendants Young and Kirby have earned and derived or have available to themselves directly or indirectly profits from said investments and business opportunities in excess of $3,000. which, except for the aforesaid acts and conduct of said defendants, would have inured to the benefit of defendant Alleghany, and the exact amount of which can be ascertained only upon the trial of this action.

[fol. 1272] WHEREFORE, plaintiffs demand judgment

(a) Declaring Alleghany Corporation to have been from at least January 19, 1954, and now to be an investment company within the meaning of Section 3 of the Investment Company Act, 15 USCA §80a-3;

(b) Adjudging that defendants have caused Alleghany to refrain from registering under the Investment Company Act in contravention of the requirements of said Act; and requiring said defendants to cause Alleghany to register thereunder;

(c) Compelling the individual defendants to account to Alleghany for all profits, benefits, and other emoluments earned and derived in connection with the acts and transactions above described;

(d) Rescinding and declaring void the sale to the Murchison Group of 20% of the voting stock of I. D. S. referred to in paragraph 19(2), and all agreements in respect thereof; and cancelling and declaring void all agreements for the sale and exchange of the I. D. S. stock referred to in paragraph 45 of the amended complaint, and enjoining defendants from consummating the agreements and transactions set forth in said paragraph 45;

(e) Appointing a permanent receiver for defendant Alleghany;

(f) Permanently enjoining defendant Alleghany and defendants Young, Kirby, Briggs, Deegan, Foskett, Guild,

Neff and Van Pelt from issuing the securities referred to in the Third Count or from taking any further steps in [fol. 1273] pursuance of the proposal therein referred to; and cancelling and declaring void any articles of amendment to the Certificate of Incorporation of defendant Alleghany which may be filed to effectuate said proposal;

(g) Adjudging that defendants Kirby, Briggs, Deegan, Foskett, Guild, Neff, Van Pelt and Young have been guilty of gross abuse of trust in respect of Alleghany as officers and directors of Alleghany, and permanently enjoining said defendants from acting in such capacities;

(h) Assessing against the individual defendants and each of them the damages sustained by Alleghany Corporation by reason of said acts and conduct and awarding the amount thereof to defendant Alleghany Corporation;

(i) Requiring defendant Alleghany to pay to plaintiffs the expenses reasonably incurred by them in the prosecution of this action;

(j) Assessing the costs and disbursements of this action against the individual defendants and the defendant Alleghany and awarding to plaintiffs the amount thereof; and

(k) Awarding to defendant Alleghany such other, further and different relief as may be proper.

Rosston, Hort & Brussel

By: George Brussel, Jr.
A member of the firm.

Attorneys for Plaintiffs,
141 Broadway,
New York 6, N. Y.

[fol. 1274]

IN THE UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT NO. 20

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 98-371

BRESWICK & CO., *et ano.*,

Plaintiffs,

—against—

O. HENRY BRIGGS, *et al.*,

Defendants.

Civil Action No. 107-176

BRESWICK & CO., *et al.*,

Plaintiffs,

—against—

ROBERT R. YOUNG, *et al.*,

Defendants.

Civil Action No. 101-114

BRESWICK & CO., *et al.*,

Plaintiffs,

—against—

UNITED STATES, *et al.*,

Defendants.

ORDER

At New York, New York, in said District
on September , 1956.

This Court having made an Order in Civil Action No. 98-371 dated October 27, 1955, which Order provides *inter alia:*

[fol. 1275] "1. Plaintiffs' motion for an order staying all proceedings in the consolidated action instituted in the Supreme Court of the State of New York, County of New York, by Sadie Zenn, et al., plaintiffs, against J. J. Anzalone, et al., defendants, (New York County Clerk's Index No. 7244-1954), be and it hereby is granted to the extent of permanently enjoining the defendants herein, and each of them, and their attorneys, from:

"(A) Interposing in this action any defense based upon any judgment entered in any action other than this action pursuant to any agreement not negotiated with the plaintiffs or their attorneys, and

"(B) Interposing in this action any defense based upon any judgment entered in the consolidated action instituted in the Supreme Court of the State of New York, County of New York, by Sadie Zenn, et al., as plaintiffs, against J. J. Anzalone, et al., defendants, (New York County Clerk's Index No. 7244-1954) entered pursuant to or deriving from any agreement of settlement of any causes of action set forth in the complaint in said action not negotiated with plaintiffs herein or their attorneys, except that, if the Supreme Court of the State of New York in said action pending before it adjudge that the pro-[fol. 1276] posed settlement be approved, any payment by or for the account of the defendants herein made in pursuance of such judgment shall be allowed in reduction of any recovery obtained by plaintiffs herein and shall be credited against any execution issued upon any judgment entered upon such recovery.";

the disposition of various motions made by the parties herein subsequent to the entry of the aforesaid Order

having been adjourned from time to time pending settlement negotiations between the parties; the defendants having in the course of said negotiations made increased offers of settlement to plaintiffs; plaintiffs having rejected said offers and having made certain counter-proposals which were unacceptable to defendants; defendants having agreed to submit their final increased offer of settlement heretofore made to plaintiffs for determination of its fairness, adequacy and propriety in the settlement proceedings now pending in the Supreme Court of the State of New York, pursuant to Order of Justice Owen J. McGivern dated August 18, 1955, before Honorable Robert J. Fitzsimmons; defendants having stipulated that appearance of the plaintiffs herein before the Special Master to be heard solely on the issue hereby referred to him shall not constitute an appearance before him in his capacity as a Referee in the Supreme Court of the State of New York, or in any proceeding pending therein; defendants having moved this Court to vacate or modify its Order of October 27, 1955, on the basis of the events occurring since its issuance;

[fol. 1277] ORDERED that Robert J. Fitzsimmons be and he hereby is appointed a Special Master in Civil Action No. 98-371 to hold hearings and report to this Court on the issue of whether the aforesaid Order of this Court dated October 27, 1955, should be vacated or modified by reason of any and all matters which may have taken place since October 27, 1955, including, without limitation however, the details of the aforesaid settlement negotiations between plaintiffs and defendants; and it is further

ORDERED that the Special Master may conduct such hearings simultaneously with and as part of any further settlement hearings he may conduct in the State Court action; and it is further

ORDERED that appearance of the plaintiffs herein before the Special Master to be heard solely on the issue hereby referred to him shall not constitute an appearance before him in his capacity as a Referee in the Supreme Court of

the State of New York or in any proceeding pending therein; and it is further

ORDERED that all proceedings in Civil Action No. 98-371 and Civil Action No. 107-176 shall be and are hereby stayed until the report of the Honorable Robert J. Fitzsimmons on the issue of vacating or modifying the aforesaid Order of October 27, 1955, is made and until further order of this Court.

LAWRENCE E. WALSH
U. S. D. J.

Dated: October 3, 1956.

[fol. 1278]

IN THE UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT No. 21

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 98-371

BRESWICK & Co., *et ano.*,

Plaintiffs,

—against—

O. HENRY BRIGGS, *et al.*,

Defendants.

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Thomas F. Daly sworn to on the 17th day of March, 1956, and upon the pleadings and all papers filed and proceedings heretofore had herein, the undersigned will move this Court at the United States Court House, Room 1505, Foley

Square, New York City, on the 26th day of March, 1956, at 10:30 a.m. in the forenoon, or so soon thereafter as counsel may be heard, for an order vacating that part of the order of this Court entered in the above entitled action dated October 27, 1955, which provides:

> "1. Plaintiffs' motion for an order staying all proceedings in the consolidated action instituted in the Supreme Court of the State of New York, County of New York, by Sadie Zenn, et al., plaintiffs, against J. J. Anzalone, et al., defendants, (New York County Clerk's Index No. 7244-1954), be and it hereby is granted to the extent of permanently enjoining the defendants herein, and each of them, and their attorneys, from:
>
> "(A) Interposing in this action any defense based upon any judgment entered in any action other than this action pursuant to any agreement not negotiated with the plaintiffs or their attorneys, and
>
> [fol. 1279] "(B) Interposing in this action any defense based upon any judgment entered in the consolidated action instituted in the Supreme Court of the State of New York, County of New York, by Sadie Zenn, et al., as plaintiffs, against J. J. Anzalone, et al., defendants, (New York County Clerk's Index No. 7244-1954) entered pursuant to or deriving from any agreement of settlement of any causes of action set forth in the complaint in said action not negotiated with plaintiffs herein or their attorneys, except that, if the Supreme Court of the State of New York in said action pending before it adjudge that the proposed settlement be approved, any payment by or for the account of the defendants herein made in pursuance of such judgment shall be allowed in reduction of any recovery obtained by plaintiffs herein and shall be credited against any

execution issued upon any judgment entered upon such recovery."

and for such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
March 27, 1956.

Yours, etc.

LORD, DAY & LORD

By /s/ JOHN W. CASTLES, 3d
a Partner

Attorneys for defendants
O. Henry Briggs, Thomas J. Deegan, Jr., Walter W. Foskett, Henry J. Guild, Allan P. Kirby, Herman R. Neff, and Alleghany Corporation

To:

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Attorneys for Plaintiffs
141 Broadway
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SATTERLEE, WARFIELD & STEPHENS, Esqs.
Attorneys for Defendants
Clint W. Murchison, Sid W. Richardson, John D. Murchison, Clint W. Richardson, Jr. and Murchison Brothers
460 Park Avenue
New York, New York

[fol. 1280]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 98-371

BRESWICK & Co., *et ano.*,

Plaintiffs,

—against—

O. HENRY BRIGGS, *et al.*,

Defendants.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 107-176

BRESWICK & Co., *et al.*,

Plaintiffs,

—against—

ROBERT R. YOUNG, *et al.*,

Defendants.

SUPPLEMENTAL NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavits of Thomas F. Daly and F. W. H. Adams and Harold M. Kennedy, all sworn to on the 11th day of September, 1956, the undersigned will move this Court at the United States Court House in the Chambers of the Honorable Lawrence E. Walsh, Room 1902, Foley Square, New York City, on the 14th day of September, 1956, at 4:00 p.m., for an order vacating that part of the Order of this Court entered in the action entitled above, *Breswick & Co., et ano.*, against *O. Henry Briggs, et al.*, Civil Action No. 98-371, and dated October 27, 1955, which provides:

[fol. 1281] "1. Plaintiffs' motion for an order staying all proceedings in the consolidated action instituted in the Supreme Court of the State of New York, County of New York, by Sadie Zenn, et al., plaintiffs, against J. J. Anzalone, et al., defendants, (New York County Clerk's Index No. 7244-1954), be and it hereby is granted to the extent of permanently enjoining the defendants herein, and each of them, and their attorneys, from:

"(A) Interposing in this action any defense based upon any judgment entered in any action other than this action pursuant to any agreement not negotiated with the plaintiffs or their attorneys, and

"(B) Interposing in this action any defense based upon any judgment entered in the consolidated action instituted in the Supreme Court of the State of New York, County of New York, by Sadie Zenn, et al., as plaintiffs, against J. J. Anzalone, et al., defendants, (New York County Clerk's Index No. 7244-1954) entered pursuant to or deriving from any agreement of settlement of any causes of action set forth in the complaint in said action not negotiated with plaintiffs herein or their attorneys, except that, if the Supreme Court of the State of New York in said action pending before it adjudge that the proposed settlement be approved, any payment by or for the account of the defendants herein made in pursuance of such judgment shall be allowed in reduction of any recovery obtained by plaintiffs herein and shall be credited against any execution issued upon any judgment entered upon such recovery.";

for an order appointing Robert J. Fitzsimmons a Special Master to hold hearings and to report to this Court with respect to whether the aforesaid Order should be vacated by reason of any and all matters which may have taken place since October 27, 1955, a proposed form of Order appointing said Special Master and granting certain incidental relief being attached to this supplemental notice; and for an order

granting defendants such other and further relief as to [fol. 1282] this Court may seem just and proper.

Dated: New York, N. Y.
September 11, 1956

Yours, etc.,

LORD, DAY & LORD

by Thomas F. Daly
a Member of the Firm

Attorneys for Defendants
O. Henry Briggs, Thomas J. Deegan, Jr., Walter W. Foskett, Henry J. Guild, Allan P. Kirby, Herman R. Neff, Robert R. Young and Alleghany Corporation In Civ. No. 98-371
and Defendants Alleghany Corporation and Peter George Martin, Jr. in Civ No. 107-176
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To:

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295 Madison Avenue
New York, New York

[fol. 1283]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 98-371

BRESWICK & Co., et ano.,

Plaintiffs,

—against—

O. HENRY BRIGGS, et al.,

Defendants.

Civil Action No. 107-176

BRESWICK & Co., et al.,

Plaintiffs,

—against—

ROBERT R. YOUNG, et al.,

Defendants.

Civil Action No. 101-114

BRESWICK & Co., et al.,

Plaintiffs,

—against—

UNITED STATES, et al.,

Defendants.

ORDER

At New York, New York, in said District on September , 1956.

This Court having made an Order in Civil Action No. 98-371 dated October 27, 1955, which Order provides *inter alia*:

"1. Plaintiffs' motion for an order staying all proceedings in the consolidated action instituted in the Supreme Court of the State of New York, County of New York, by Sadie Zenn, et al., plaintiffs, against J. J. Anzalone, et al., defendants, (New York County [fol. 1284] Clerk's Index No. 7244-1954), be and it hereby is granted to the extent of permanently enjoining the defendants herein, and each of them, and their attorneys, from:

"(A) Interposing in this action any defense based upon any judgment entered in any action other than this action pursuant to any agreement not negotiated with the plaintiffs or their attorneys, and

"(B) Interposing in this action any defense based upon any judgment entered in the consolidated action instituted in the Supreme Court of the State of New York, County of New York, by Sadie Zenn, et al., as plaintiffs, against J. J. Anzalone, et al., defendants, (New York County Clerk's Index No. 7244-1954) entered pursuant to or deriving from any

agreement of settlement of any causes of action set forth in the complaint in said action not negotiated with plaintiffs herein or their attorneys, except that, if the Supreme Court of the State of New York in said action pending before it adjudge that the proposed settlement be approved, any payment by or for the account of the defendants herein made in pursuance of such judgment shall be allowed in reduction of any recovery obtained by plaintiffs herein and shall be credited against any execution issued upon any judgment entered upon such recovery.";

the disposition of various motions made by the parties herein subsequent to the entry of the aforesaid Order having been adjourned from time to time pending settlement negotiations between the parties; the defendants having in the course of said negotiations made increased offers of settlement to plaintiffs; plaintiffs having rejected said offers and having made certain counter-proposals which were unacceptable to defendants; defendants having agreed to submit their final increased offer of settlement heretofore made to plaintiffs for determination of its fairness, adequacy and propriety in the settlement proceedings now pending in the Supreme Court of the State of New York, pursuant to Order of Justice Owen J. McGivern dated August 18, 1955, before Honorable Robert J. Fitz-[fol. 1285] simmons; defendants having moved this Court to vacate or modify its Order of October 27, 1955, on the basis of the events occurring since its issuance;

ORDERED that Robert J. Fitzsimmons be and he hereby is appointed a Special Master in Civil Action No. 98-371 to hold hearings and report to this Court on the issue of whether the aforesaid Order of this Court dated October 27, 1955, should be vacated or modified by reason of any and all matters which may have taken place since October 27, 1955, including, without limitation however, the details of the aforesaid settlement negotiations between plaintiffs and defendants; and it is further

ORDERED that the Special Master may conduct such hearings simultaneously with and as part of any further settlement hearings he may conduct in the State Court action; and it is further

ORDERED that appearance of the plaintiffs herein before the Special Master to be heard solely on the issue hereby referred to him shall not constitute an appearance before him in his capacity as a Referee in the Supreme Court of the State of New York; and it is further

ORDERED that all proceedings in Civil Action No. 98-371 and Civil Action No. 107-176 shall be and are hereby stayed until the report of the Honorable Robert J. Fitzsimmons on the issue of vacating or modifying the aforesaid Order of October 27, 1955, is made and until further order of this Court.

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U.S.D.J.

Dated: September , 1956.

[fol. 1286]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 98-371

BRESWICK & Co., et ano.,

Plaintiffs,

—against—

O. HENRY BRIGGS, et al.,

Defendants.

Civil Action No. 107-176

BRESWICK & Co., et al.,

Plaintiffs,

—against—

ROBERT R. YOUNG, et al.,

Defendants.

Civil Action No. 101-114

BRESWICK & Co., et al.,

Plaintiffs,

—against—

UNITED STATES, et al.,

Defendants.

AFFIDAVIT

STATE OF NEW YORK,
COUNTY OF NEW YORK, SS.:

THOMAS F. DALY, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court and of the firm of Lord, Day & Lord, attorneys in No. 98-371 for defendants Young, Kirby, Briggs, Deegan, Foskett, Guild, Neff and Alleghany Corporation. I make this affidavit by [fol. 1287] leave of Judge Walsh in further support of a motion by said defendants for an order vacating that portion of the order of this Court in No. 98-371, dated October 27, 1955, which provides:

> "1. Plaintiffs' motion for an order staying all proceedings in the consolidated action instituted in the Supreme Court of the State of New York, County of New York, by Sadie Zenn, et al., plaintiffs, against J. J. Anzalone, et al., defendants, (New York County Clerk's Index No. 7244-1954), be and it hereby is granted to the extent of permanently enjoining the

defendants herein, and each of them, and their attorneys, from:

"(A) Interposing in this action any defense based upon any judgment entered in any action other than this action pursuant to any agreement not negotiated with the plaintiffs or their attorneys, and

"(B) Interposing in this action any defense based upon any judgment entered in the consolidated action instituted in the Supreme Court of the State of New York, County of New York, by Sadie Zenn, et al., as plaintiffs, against J. J. Anzalone, et al., defendants, (New York County Clerk's Index No. 7244-1954) entered pursuant to or deriving from any agreement of settlement of any causes of action set forth in the complaint in said action not negotiated with plaintiffs herein or their attorneys, except that, if the Supreme Court of the State of New York in said action pending before it adjudge that the proposed settlement be approved, any payment by or for the account of the defendants herein made in pursuance of such judgment shall be allowed in reduction of any recovery obtained by plaintiffs herein and shall be credited against any execution issued upon any judgment entered upon such recovery."

2. By supplemental motion of this date, defendants move for vacatur on the ground that, as a result of developments occurring since the issuance of said order, the reasons which led to the issuance of the order no longer pertain. Those reasons are set forth in this Court's opinion of September [fol. 1288] 28, 1955, which is reprinted at 135 F. Supp. 397.

3. Among other developments occurring since October 27, 1955 which so alter the situation existing before that date as to require, in my opinion, vacatur of the above quoted injunction, one is of overriding importance: defendants have, since that date, negotiated in good faith

with the attorney for the plaintiffs here and have made substantially increased offers of settlement to him, over and above those previously agreed to with general counsel for the plaintiff stockholders in certain parallel actions in which are alleged all of the causes of action herein alleged. Although such offers have not been accepted by counsel for the Breswick plaintiffs (i.e., the plaintiffs in No. 98-371), counsel for defendants have agreed to increase the amount of the proposed settlement of the State Court Zenn action (referred to in the above quoted portion of this Court's order of October 27, 1955) by the amount of the offers made to the Breswick plaintiffs, so that if such settlement is approved by the State Court and consummated, Alleghany Corporation will receive what it would have received if the Breswick plaintiffs had accepted such offers. We are willing to submit these increased offers to the State Court, well knowing that the Breswick plaintiffs reserve the right to argue that the proposed settlement is still inadequate.

4. It will perhaps be helpful to the Court, and to such referee as the Court may appoint, for me to set forth briefly certain of the events which led up to the making of the present motion.

[fol. 1289] *Genesis of the Present Motion*

5. On March 26, 1956, this Court heard extensive argument on a number of motions, including among others motions by plaintiffs to enjoin further prosecution of the State Court Zenn settlement proceedings to enjoin defendants from further prosecuting certain contempt proceedings in the State Court Zenn action, and to punish certain of the defendants for contempt of this Court because of certain of their activities in the State Court Zenn action, and a motion by defendants represented by Lord, Day & Lord for vacatur of the injunctive provisions of this Court's order dated October 27, 1955, on the ground that defendants had not acted improperly in arriving at and in pre-

senting to the State Court for approval the proposed settlement of the State Court Zenn action, and on the further ground that the Breswick plaintiffs had appeared in the State Court Zenn settlement proceedings.

6. At the conclusion of the argument on that day the Court declared a recess and a conference of counsel and the Court took place in chambers. At that conference, and (except as otherwise specified) at all of the subsequent conferences in chambers hereinafter referred to, there were present:

ROSSTON, HORT & BRUSSEL, Esqs.
Attorneys for Breswick & Co.;
(George Brussel, Jr., Esq., of Counsel.)

LORD, DAY & LORD, Esqs.,
Attorneys for certain individual defendants;
(Thomas F. Daly, Esq., of Counsel.)

BURLINGHAM, HUPPER & KENNEDY, Esqs.
Attorneys for Thomas F. Daly;
(Harold M. Kennedy, Esq., of Counsel.)

SATTERLEE, WARFIELD & STEPHENS, Esqs.,
Attorneys for Murchison, et al., defendants in action based on original complaint only;
(F. W. H. Adams, Esq., of Counsel.)

[fol. 1290] POMERANTZ, LEVY & HAUDEK, Esqs.,
Attorneys for Plaintiff in Companion State Court cases and General Counsel in the Consolidated Zenn action in United States District Court, Southern District of New York;
(Abraham L. Pomerantz, Esq., of Counsel.)

Harold M. Kennedy, of Burlingham, Hupper & Kennedy, attorneys for Thomas F. Daly, Seymour Graubard, of Graubard & Moskovitz, Mr. Brussel's co-counsel in the State Court Zenn settlement proceedings, and Randolph

Phillips, plaintiff in No. 107-176, Pro Se, and others associated with the foregoing counsel were in attendance at various of the meetings.

7. As a result of the March 26 discussion, a further conference was held among the same groups and the Court on April 2, 1956. The question of negotiating a settlement of the whole case then came up and the Court expressed approval of negotiations for settlement between George Brussel, Jr., Esq., representing the Breswick plaintiffs, and Mr. Adams and myself, representing the defendants in the State and Federal Court actions.
[fol. 1291]

The Negotiations of April 11

On the afternoon of April 11, 1956, as the result of Judge Walsh's request, Mr. Adams and I met with Mr. Brussel at the offices of Lord, Day & Lord, for the purpose of discussing the possibility of settlement. At the outset we pointed out to Mr. Brussel that we had gone on for five months before Referee Fitzsimmons presenting evidence pro and con; that voluminous briefs had been exchanged; that, accordingly, each side must be well acquainted with the contentions of the other and that after hearing their evidence we were still of the opinion that the defendants at a trial would recover judgment and that the settlement submitted to the Supreme Court was a fair one. We said that in view of this, before we began discussions, we wanted to know whether he knew of any further evidence which had not been introduced at the hearings which, in his opinion, would fairly lead us to believe that we were mistaken in our views.

Mr. Brussel replied that the only evidence that they had upon the merits of the settlement which had not been offered at the reference was the testimony of Mr. Phillips. We suggested that he advise us of such evidence then and there. This he declined to do. No such evidence has ever been submitted in any part of these proceedings, including the proceedings before the S.E.C.

We then said to Brussel that since he in effect was representing the plaintiffs who had maintained that they had no opportunity to present their point of view to us in settlement negotiations, it was up to him to do so now. Brussel agreed and suggested the following:
[fol. 1292] A new corporation was to be set up, which was to issue 100 shares of common stock as follows:

50 shares to Alleghany Corporation.
50 shares to defendants to be divided in accordance with amount of New York Central stock transferred by each to the new corporation.

Defendants between them would transfer over to the new corporation 300,000 shares of New York Central common stock. The new corporation was then to issue two classes of debentures designated as Class "A" and Class "B" debentures. The Class "A" debentures were to be issued to Alleghany Corporation in a dollar amount equal to the difference between what defendants had paid for the New York Central stock and the highest price which the stock had reached in the market, which was approximately 49. Thus, for example, if Young and Kirby transferred the stock Brussel estimated that the profit (and therefore the amount of Class "A" debentures Alleghany would receive) would be about $10,800,000. These Class "A" debentures were to pay interest and were to be retired at the rate of 20% a year, so that at the end of five years they would be completely liquidated. The Class "B" debentures were to be subordinate to the Class "A"; were to bear non-cumulative interest and to be payable at the end of ten years. They were to be issued to defendants in a dollar amount to compensate them for the cost to them of the 300,000 shares of the New York Central stock given by them to the new corporation, which Brussel estimated at about $8,600,000. If there were any capital gains tax on the transaction, defendants would meet such tax themselves. Brussel also said his offer contemplated that the control of I.D.S. be

returned from the Murchison group to Alleghany Corporation.

[fol. 1293] Brussel made it clear that he was willing to bargain somewhat on the dollar amount of the first series of debentures. In other words, he said that assuming that the spread between what defendants paid for the Central stock and the highest price was 30 points, that they would be willing to shave off a few points on this.

We said that we did not believe that defendants would be interested in any such proposition, but that we would submit it to them. He then asked me whether we had any proposition to make. We said that we would be willing to recommend for a starter that the defendants transfer 200,000 shares of the New York Central stock to Alleghany at a small discount below market. Thus Alleghany would have an immediate cash saving and would acquire a large block of Central stock without any risk of driving the market up. Mr. Adams made it clear that he was not interested in bargaining on the basis of a return of control of I.D.S.

Thereafter Brussel left. It was our understanding that the meeting had been merely exploratory and that another meeting would be held. But because of various engagements of Brussel, no further meetings were held with him prior to our appearing before Judge Walsh on April 17th. At that meeting, Judge Walsh requested all parties to continue negotiations to see if a settlement could not be arrived at.

[fol. 1294]

The Negotiations of April 24.

Thereafter, on April 24th, another meeting was held at the offices of Lord, Day & Lord. Mr. Brussel rejected our offer and we likewise rejected his. At that time we pointed out to Brussel that under his scheme defendants were taking all the risk; that it could well be that all of the Central stock, the new corporation's only asset, would have to be liquidated in order to pay the 20% a year on the debentures

Alleghany would receive and thus defendants would get nothing for their debentures or, if they wished to gamble, they would have to advance funds each year in order to protect their investment and even then they might end up getting nothing. Thus they might find themselves in this position after not only giving up their present profit and dividends on the New York Central stock, but also after paying Alleghany all of the profit and dividends and after paying a capital gains tax on the so-called profit.

Brussel again indicated a willingness to reduce the spread between the cost of the stock and the highest market value therefor.

We said that we did not believe that defendants would be interested in such a proposition, not only for the reasons heretofore indicated, but also because the debentures to be issued to them would be unmarketable and thus they could not sell or borrow on them in order to obtain cash to pay the capital gains tax that would be due on the transaction.

[fol. 1295] We then made the following counter-offer to Brussel: Defendants would transfer 200,000 shares of the New York Central stock to Alleghany Corporation at a discount of approximately ½ point in return for a five-year cumulative convertible debenture of Alleghany Corporation, paying 5½% interest, the debentures to be convertible into common stock of Alleghany at the end of five years. Thus, Alleghany would have five years in which to pay for the stock with a good chance that at the end of five years the defendants would convert into common stock, in which event Alleghany would have nothing to pay. Brussel said that he would consult with his people and meet with us thereafter.

The Negotiations of April 27.

We again met on April 27th at this office. Brussel at this time said that our proposition was unacceptable to them as it might increase the debt structure of Alleghany Corporation and they were opposed to this.

He then made the following proposition: (1) a holding company be organized; (2) defendants transfer to the holding company 300,000 shares of New York Central common; (3) the holding company would then issue the following debentures to Alleghany Corporation:

a. Cumulative interest bearing Series "A" debentures in the mount of $10,800,000 payable 20% a year. The face value of $10,800,000 again was Brussel's estimate of the highest book profit that Young and Kirby had on their Central stock.

b. Non-cumulative interest-bearing Series "B" debentures in the amount of $8,600,000 convertible at the end of 10 years to stocks in the holding company would be issued [fol. 1296] to the defendants in the amount of their contributions of New York Central stock. The value of $8,600,000 likewise was Brussel's estimate of the cost to Young and Kirby of their New York Central stock.

(4) 800,000 shares of holding company stock to be authorized which was to be issued as follows:

a. 400,000 shares to be held in reserve for conversion as provided in "b" above.

b. 100,000 shares to be issued to Young assuming that he was the one who transferred Central stock.

c. 100,000 shares to be issued to Kirby likewise assuming that he was the one who transferred New York Central stock.

d. 200,000 shares to be issued to Alleghany Corporation.

Brussel indicated that they would be willing to accept Series "A" debentures in an amount less than $10,800,000. When pressed as to how much less, he said it would have to be a "major fraction" of the profit but did not define it any more precisely. We said we would report to our principals and a meeting was set for Friday, May 4th at 4:30 P.M. at the University Club.

The Negotiations of May 4.

On May 4th at 4:30 in the afternoon, we met with Brussel at the University Club. We said that defendants rejected his offer because it had the same objectionable features as his previous ones. We said that we had reported to the defendants Brussel's concern about increasing the debt structure of Alleghany by the issuance of debentures in return for New York Central stock and that to avoid any change or increase in Alleghany's outstanding obligation we were authorized to make the following offer:

[fol. 1297] The defendants would transfer to Alleghany 200,000 shares of New York Central stock at a discount of ¾ of a point from market value as of the date of exchange in return for Alleghany Corporation warrants on its common stock valued as of the same date. We pointed out to Brussel that the issuance of the warrants (which had already been authorized) would not create any book liability for Alleghany and, in fact, might never cost Alleghany anything as the warrants might never be exercised. We further pointed out that as this exchange would not entail any interest being paid on the debentures there would be no carrying charges entailed, and furthermore Alleghany would be receiving the dividend of $2.00 a share on the New York Central stock transferred to it. Thus Alleghany without danger of running up the market price would be acquiring an asset of 200,000 shares of New York Central stock at no present or future cost to it and at a price $150,000 below market. In addition, it would not have to pay to the defendants the interest or other carrying charges envisaged in Brussel's and our prior proposals and would be receiving a dividend of $2.00 per share or $400,000 a year on the Central stock.

Brussel said that once the defendants got the warrants they could immediately convert them into common stock. We pointed out that if they did this they would be required to pay to Alleghany at the time of the conversion $3.75 on each warrant. We further said if he was worried about

this we could probably get the defendants to agree to hold up their right to convert for a period of time. Brussel agreed to meet again with us on Monday after he had discussed the matter with his people.

[fol. 1298] *The Negotiations of May 7.*

On Monday, May 7th, in the afternoon, we met at Mr. Adams' office. Brussel did not flatly reject the offer we had made to exchange Central stock for Alleghany warrants. Indeed, he expressed the opinion which he said was based on his accountant's figures that the offer to exchange Central stock for warrants was worth at least 30 cents a share to the common stockholders. This would amount to about $1,400,000. He then discussed various defects which he said he saw, but his chief complaint was that we had not come up substantially in the amount of discount that we were willing to offer. At this point we said that we would be willing to recommend a discount of $300,000 and that the defendants would agree not to convert the warrants for two years. At all of these meetings Brussel insisted that as part of any settlement we must agree that control of I.D.S. was to be returned to Alleghany Corporation, but we would not consent to this.

On Monday, May 8th, I received a letter from Mr. Brussel enclosing a copy of a letter to the Court saying that because of my refusal to withhold the filing of the briefs he must ask for a submission of the motions. Copies of such letters and of my letter to the Court are annexed hereto as Exhibits "A", "B" and "C" respectively.

Thereafter, because of Mr. Brussel's failure to continue discussions, we met before the Court on May 17th concerning the status of the negotiations. At that time the Court set down argument on the various motions for May 31st.

[fol. 1299]

The Negotiations of May 31.

On that day, after further argument on the motions, Judge Walsh again suggested that further negotiations for settlement take place.

Thereafter I, together with Mr. Adams and Judge Harold M. Kennedy, who at the May 31st discussion was invited by Judge Walsh to participate in the negotiations for settlement, met with Mr. Brussel at the Bar Association in the afternoon of that day. Brussel said that he had taken up our latest proposal and that his clients were not agreeable to it. We again pointed out the advantages to Alleghany, even on his own accountant's figures, of the proposal to exchange the stock for warrants. Moreover, and for the first time, we said that we would be willing to make the return of control of I.D.S. to Alleghany Corporation an addition to our proposal of settlement. Although this had been one of the conditions which Brussel had insisted on from the beginning, he now demurred and said that it would really have no value to Alleghany. We then pointed out that he and his co-counsel in the proceedings before the State Court Referee had valued "conservatively at not less than $5,000,000" control of I.D.S. and it seemed that in view of this he was now taking an extremely inconsistent position in saying that return of control was of no value.

We were thus making an offer which, according to their own prior estimates, was worth at least $6,400,000 to Alleghany.

[fol. 1300] There was then some discussion introduced by me on my own initiative and merely for the purpose of exploration as to whether the debentures which Brussel had previously proposed to be issued for the New York Central stock to Alleghany Corporation could not be paid out of dividends alone, so as to remove some of the objections I had previously made concerning his proposal for payment of the Class "A" debentures at the rate of 20% a year.

No conclusions were arrived at, but it was agreed that another meeting would take place on June 27th.

At this meeting of May 31st, as at all previous meetings, it was understood that as part of the settlement the defendants would assume the burden of paying any income or capital gains tax that might be due from them as a result of their transferring any of their New York Central stock.

[fol. 1301]

The Negotiations of June 27.

As previously arranged, I met with Mr. Brussel together with Judge Kennedy at the latter's office at about 1:15 p.m. on June 27th. Mr. Adams was unable to attend this meeting. Immediately after Mr. Brussel's arrival, we left for the India House for lunch. During lunch, the following settlement negotiations took place: Mr. Brussel first said that they were not interested in exchanging the Central Stock for Alleghany warrants. He then said the suggestion that I had made at our last meeting concerning the possibility of exchanging the New York Central Stock for debentures, payment of the debentures to be made out of dividends, was agreeable to them provided it was understood that the defendants would obligate themselves to underwrite the debentures to the extent of making up the deficit if dividends were not paid on the New York Central Stock or its present dividend was reduced. I advised Mr. Brussel that since our last meeting I had discussed my suggestion with defendants and that they did not approve it. I further said that from previous conversations I had had with them, I knew that Brussel's additional proposals of a guarantee by the defendants, would be unacceptable to them. I then told Mr. Brussel that I had the following tentative proposal for his consideration i.e., the exchange of "X" number of shares of the defendants' New York Central Stock for common stock of Alleghany of an equivalent value less a discount of "X" dollars on the Central Stock; the discount to be in excess of the $300,000 discount previously offered; and Alleghany Corporation to issue to the defendants a preferred stock in an amount sufficient to cover the defendants' capital [fol. 1302] gains tax on their shares of Central stock so exchanged. Mr. Brussel said that he had no objection to such a proposition in theory as he thought that the capital gains tax of the defendants on any New York Central stock should be taken care of and that our proposal to do

it by issuing preferred stock was satisfactory to him. He then asked whether the proposition contemplated the issuance of Series "A" preferred stock to cover the capital gains tax. I said no, that the proposition contemplated the issuance of a new preferred stock. Mr. Brussel then asked how many shares of New York Central stock defendants would give up. I told him that I believed I might get them to give up 550,000 shares of that stock. He then asked whether the total discount would vary, depending upon the number of shares given up. I told him that it would not, inasmuch as I had in mind a definite over-all figure of the amount that would be paid by the defendants by way of discount, but I pointed out that the fewer the shares of New York Central stock exchanged with Alleghany, the less the capital gains tax would be, and hence the fewer shares of preferred stock would have to be issued in payment of the tax, and thus it might be advantageous to Alleghany stockholders if fewer shares of New York Central stock were taken in settlement. Brussel then said he was thinking of a discount in seven figures. I told him that that was impossible; that we would never consider going above a six figure discount, but that I was willing to recommend that the defendants go above the discount of $300,000 previously mentioned. I made it definite to Mr. Brussel that unless he and his associates were willing to retreat from their seven figure discount, there [fol. 1303] was no point in continuing the discussion. He then asked me if I would tell him how much further I was willing to go above the $300,000 discount already suggested as a possible figure. I refused to do so, pointing out that I should not be called upon to do so until such time as he and his associates were ready to discuss a discount in six rather than seven figures. I added, that to sweeten the deal the defendants were still willing to return control of I.D.S. to Alleghany, which he and his colleagues had valued at "not less than $5,000,000." With this the conference came to an end and Mr. Brussel said that he would take up our suggestions with his people, and let us know if they were interested.

On Friday, June 29th, we again returned to the Court. At this conference Mr. Brussel said again—as on previous occasions—that he was convinced that the "defendants" were negotiating "in good faith" and that the offers that they had made were a substantial increase over the offer pending in the State Court. Judge Walsh then asked the defendants whether they would be willing to make the same offer to the State Court Referee as they had made to Brussel on June 27th. The defendants told Judge Walsh that they would be willing to do so. Judge Walsh, however suggested that as he was going away on vacation the whole matter be put over until August 1st for further consideration. He also said, among other things, that he hoped that in the meantime the parties would continue with their negotiations looking towards a settlement.
[fol. 1304]

The Negotiations of July 6.

Thereafter, Judge Kennedy and I again met with Mr. Brussel on July 6, 1956 at 10:30 o'clock in the morning. Mr. Adams was again unable to attend this meeting. Brussel turned down the suggestions that I had made at the previous meeting and then came forward with the following proposal: (1) return of 550,000 shares of New York Central stock at a discount of 2 points or $1,100,000; (2) the issuance of an Alleghany Preferred stock at par, in an amount equal to the adjusted market price of the Central stock returned. He gave the following example: The market is $40; 10 Central shares are returned; the equivalent of $380 would be issued in preferred stock at par. He said that his offer contemplated that defendants would have to take care of the capital gains tax on the transaction. He further said (3) that we would have to reverse "in good faith" the I.D.S. transaction. Upon being queried as to what he meant by "good faith" he said that they were demanding that the stock returned would have to be trusteed and that the minority represented by him have representation on the Board of Trustees.

Brussel's previous demands with respect to I.D.S. were merely that the Murchisons return voting control to Alleghany. Thus after getting us to agree to his proposal, he then retracted it by insisting on further conditions to it.

While I said I would, of course, take his suggestions back to the defendants, I made two things clear. First, that a two-point discount produced a figure in the millions and I had previously told Brussel that under no circumstances [fol. 1305] would we discuss a discount in seven figures. Second, that I knew the defendants would not be interested in receiving any preferred stock unless the preferred stock had a conversion feature, because defendants believed in and were interested in sharing in the future of Alleghany.

The Negotiations of July 10.

At 10:45 on July 10, 1956, Mr. Brussel again met with Judge Kennedy and myself at Judge Kennedy's office. Mr. Adams was unable to attend this meeting. I told Mr. Brussel that the defendants had rejected in toto his proposal made on July 6th. I said: (1) that in no event would the defendants stand the income tax as a basis of an exchange of 550,000 shares of New York Central stock; (2) in no event would defendants accept the "in good faith" formulae with respect to the I.D.S. transfer even if it were legally possible to do so and we believed that it was extremely doubtful that this could be done; (3) in no event would the defendants pay a discount running into seven figures and (4) in no event would the defendants exchange the Central stock for non-convertible preferred stock or preferred stock bearing only 2½% interest.

I then made the following counter-proposal: (1) 225,000 shares of New York Central stock to be given Alleghany Corporation at a discount of $300,000 in exchange for a new 4% cumulative preferred stock, junior to the $6.00 and $4.00 preferred stock, with a two year non-callable, non-convertible feature, convertible thereafter to Alleghany common; (2) the equivalence of the preferred and

the Central as well as the equivalence of the Alleghany [fol. 1306] common under the convertible feature would be determined as of the date of the final approval of settlement; par value of the new preferred to be fixed at its estimated market value as of the date of the final approval of settlement, this to be done by an independent brokerage house such as Merrill, Lynch; in the case of Central and Alleghany common, the market value on the date of the final approval of settlement to be used; (3) defendants to bear their own tax, which I estimated during this conference at $1,000,000 with no one purporting to vouch for the accuracy of this estimate; (4) return of control of I.D.S., but no trusteeship.

The effect of this offer, if accepted, would have been to give Alleghany immediately a capital asset consisting of 225,000 shares of New York Central stock obtained at $300,000 below the market, with no increase in its outstanding debts and at no cost to it other than the issuance of a new junior preferred stock which could be converted at the end of two years into common stock of Alleghany Corporation. The Company would also receive dividends of $450,000 a year on the New York Central stock while paying only 4% on the new stock. Thus Alleghany would be benefiting in an amount of about $180,000 a year on the difference. Likewise, Alleghany would receive back control of I.D.S. which control Brussel and his colleagues have estimated to be worth "not less than" $5,000,000. Moreover, the defendants, in addition to giving up stock paying dividends of $450,000 a year and control of I.D.S., would assume payment of a capital gains tax on the transaction of at least $1,000,000.

[fol. 1307] Brussel left, saying he would be in touch with us later in the day, as Phillips was leaving for Europe the following morning and he would like to hammer out a settlement before he left.

Later in the day Brussel called me and Judge Kennedy and the three of us met at Judge Kennedy's office at 4:30 in the afternoon of the same day. Brussel rejected the offer

which I had made that morning and made the following counter-proposal:

(1) Defendants return 500,000 shares of New York Central stock rather than the 225,000 proposed.

(2) No market discount, but a cash payment by the defendants to Alleghany Corporation of a million dollars.

(3) The payment for the Central stock by way of a preferred issue was acceptable in principle. The fixing of the market value of the preferred to be open because Brussel had not had time to think about it, but he said the preferred must pay no more than 3%, must be non-cumulative, non-convertible and non-callable over a ten-year period, although on this latter point he said he was willing to bargain to some extent. He said the conversion rate of the preferred to common was to be six shares of common for each $100 value of preferred plus $3.75 payable to Alleghany Corporation.

(4) The I.D.S. transfer must contain two features:

(a) A voting trust of the shares with the minority represented on the Board of Trustees;

(b) Power to sell the shares in the hands of the Trustees.

(5) The defendants must meet their own capital gains tax.

[fol. 1308] I said that I would, of course, report this counter-offer, but I did not believe that it would be accepted by the defendants. Kennedy pointed out that only that morning I had made three things clear: that the market discount could in no event run into seven figures, yet here was a counter-offer at exactly seven figures and that I had made it clear that the "in good faith" formula on the I.D.S. exchange was out and that neither a trust nor a commitment to sell could be a part of the settlement. Yet Brussel was making as part of his proposal the very things that I had already rejected.

I further pointed out that his proposition that the preferred stock be non-cumulative, non-convertible and non-callable for a period of ten years would make such stock completely unmarketable and unpledgeable and thus the defendants could not raise any money to pay the huge capital gains tax that would be due.

The meeting then broke up on my saying that I would report his counter-proposal to the defendants and let Brussel know their thoughts on it. I thereafter was advised by the defendants that the proposition was totally unacceptable and I so told Brussel the next morning, but added that I was not closing the door to further discussion and would be glad to sit down with him at any time.

In all of the offers made either by defendants or Brussel it was made clear that they were conditioned upon obtaining the approval of the appropriate governmental agency wherever necessary, but that defendants felt that such ap- [fol. 1309] proval could be obtained wherever necessary for any of the proposals which they had advanced.

It is, of course, understood that the offers of settlement were contingent on the settlement effectively terminating all litigation then pending against any of the individual defendants herein on derivative causes of action asserted by Alleghany stockholders.

The Meetings in Chambers on August 1 and 3

Pursuant to Judge Walsh's previous instructions, a further meeting was held in his chambers on August 1, 1956 and was resumed on August 3, 1956. Judge Kennedy had to depart shortly after the first of these meetings commenced and was unable to attend the second. Mr. Phillips was not present at either of these meetings. Repeated reference was made to Mr. Brussel's previous admissions that defendants had negotiated in good faith. Mr. Brussel sought to back-track by saying that he had qualified his statements (which he had not), and that if he had not, he had meant to, by saying that counsel for the defendants had been in good faith, but not Mr. Young.

At the meetings of August 1 and August 3 it was agreed that defendants would submit the present papers and that other procedural arrangements would be adopted, said agreements being reflected in the proposed order of reference annexed hereto, which the Court is respectfully requested to sign.

[fol. 1310] Leave was granted to bring on the present motion and order on three days' notice.

We believe that, in the light of these post-injunction facts, the injunction should be lifted. For the injunction was granted on the ground that the Breswick plaintiffs were excluded from settlement negotiations. Whatever defect may be claimed to have existed in the original settlement because of such exclusion, such defect has since been repaired. As described above, long and earnest settlement negotiations have been had. If there was any unevenness in the bargaining balance between Brussel and us, that unevenness militated against us, for we were operating under the stress of an injunction which strenthened the hand of Breswick and correspondingly weakened our bargaining position.

WHEREFORE, the present motion should in all respects be granted.

THOMAS F. DALY

SWORN to before me this
11th day of September, 1956.

MARGARETTE GREENFIELD
Notary Public

MARGARETTE GREENFIELD
NOTARY PUBLIC, State of New York
No. 03-6655200
Qualified in Bronx County
Cert. files in New York County
Commission Expires March 30, 1958

(SEAL)

[fol. 1311]

EXHIBIT "A"

ROSSTON, HORT & BBUSSEL
141 Broadway
New York 6, New York

May 7, 1956

Thomas F. Daly, Esq.
25 Broadway
New York City

Re: Breswick v. *Briggs*

Dear Mr. Daly:

I enclose a copy of a self-explanatory letter to Judge Walsh which is being delivered to him this afternoon.

In view of your statements at the close of our conference today, indicating the maximum that you are prepared to offer, I have no alternative but to advise my clients that this is apparently not a propitious time for further settlement discussions. If at any time you feel disposed to discuss settlement along the lines proposed by me in our various conferences, I am at your service.

Yours truly,

s/ GEORGE BRUSSEL, JR. (EK)
George Brussel, Jr.

GB:SRM
Enc.

[fol. 1312]

EXHIBIT "B"

ROSSTON, HORT & BRUSSEL
141 Broadway
New York 6

May 7, 1956

Hon. Lawrence E. Walsh
United States District Court
Foley Square
New York City

Re: Breswick v. *Briggs*

Dear Judge Walsh:

Since April 24th we have had five conferences in an ineffectual effort to reach a settlement agreement.

I am now informed by Mr. Daly that he proposes to submit his briefs to the State Court Referee tomorrow and in view of this I must ask you to take a submission of the pending motions as soon as that can be done. We are prepared to submit our final briefs within a week.

Respectfully,

George Brussel, Jr.

GB:SRM

[fol. 1313]

EXHIBIT "C"

LORD, DAY & LORD
25 Broadway
New York 4

May 8, 1956

Honorable Lawrence E. Walsh
United States District Court
United States Court House
Foley Square, New York

Re: Breswick v. *Briggs*

My dear Judge Walsh:

I received in the mail today a copy of Mr. Brussel's letter to you of May 7th.

I wish to rebut any inference that may be drawn from Mr. Brussel's letter to you that the proposed filing of the briefs with the Referee in the State Court proceedings was the cause of Mr. Brussel's breaking off of the settlement negotiations. In his letter of May 7th to me, enclosing copy of his letter to you, he states:

> "In view of your statements at the close of our conference today, indicating the maximum that you are prepared to offer, I have no alternative but to advise my clients that this is apparently not a propitious time for further settlement discussions."

It thus is apparent that the breaking off of the settlement negotiations by Mr. Brussel was due not to the filing of the briefs, but to the fact that counsel were so far apart that he did not deem it advisable to continue negotiations.

While Mr. Brussel objected to the filing of the briefs with the Referee, I told him that I believed it was neces-

sary to file them because of the approaching summer season and my belief that until the final briefs were in the Referee would not do anything about preparing his opinion. But I made it clear to Mr. Brussel that I would be happy to ask the Referee to hold up the filing of his Report until such time as a settlement had been worked out with Mr. Brussel or it became apparent that it was impossible to do so.

May I say that when the conference broke up yesterday there was no indication that Mr. Brussel did not intend to continue the negotiations. It was not until I received his letter this morning that I was aware of that fact.

Miss Suchow advise me of the meeting with you for this Friday at 4:00 P.M. I told her that there is a possibility that I may be late on that day due to the fact that I may be engaged in taking depositions at Newark in the South Amboy explosion cases and may be delayed somewhat in getting in from there.

Respectfully yours,

TFD:mg
cc: George Brussel, Jr., Esq.

[fol. 1314]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 98-371

BRESWICK & Co., et ano.,
Plaintiffs,
—against—
O. HENRY BRIGGS, et al.,
Defendants.

Civil Action No. 107-176
BRESWICK & Co., et al.,
Plaintiffs,
—against—
ROBERT R. YOUNG, et al.,
Defendants.

Civil Action No. 101-114
BRESWICK & Co., et al.,
Plaintiffs,
—against—
UNITED STATES, et al.,
Defendants.

AFFIDAVIT

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

F. W. H. ADAMS, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court and of the law firm of Satterlee, Warfield & Stephens, attorneys for

the defendants Clint W. Murchison, John D. Murchison, Clint W. Murchison, Jr., Murchison Bros., and Sid W. Richardson in the action No. 98-371, as such action is at issue upon the original complaint (not upon any amendment thereof) and the answer of such defendants thereto, both of which are upon the files of this Court and are hereby referred to and made a part hereof.

[fol. 1315] 2. I make this affidavit by leave of the Court in further support of a motion by the defendants, Young, Kirby, Briggs, Deegan, Foskett, Guild, Neff and Alleghany Corporation, in Action No. 98-371 for an order vacating Paragraph 1(A), (B) of the order of this Court in such action dated October 27, 1955, and in support of a supplemental motion of this date for a vacatur of said paragraphs.

3. I have read the affidavit of Thomas F. Daly, Esq., of the firm of Lord, Day & Lord, of this date, submitted in support of said motions. I attended all of the meetings with Mr. Brussel and the conferences held with Judge Walsh which Mr. Daly states I attended, and as to those meetings which I did not attend, I was fully informed by Mr. Daly and Harold M. Kennedy, Esq. as to what took place. I was actively engaged throughout all of said negotiations with Mr. Daly and Mr. Kennedy in consideration of the offers made by Mr. Brussel, the preparation and submission of counter-offers and of all of the matters relating to said negotiations. The affidavit of Mr. Daly states the facts with respect to said negotiations accurately and fairly. The negotiations were carried on in good faith and in an earnest effort by the defendants to arrive at a satisfactory settlement.

4. During the course of the negotiations Mr. Brussel and his colleagues were given every opportunity to negotiate on the same basis as though they had been included in the original negotiations. On the other hand, the defendants, by reason of the circumstances, were necessarily

negotiating under the compulsion of the injunction obtained in the order of October 27, 1955.

[fol. 1316] 5. As a result, although the defendants have carried on lengthy negotiations which have been conceded to have been in good faith and to have involved substantial proposals in relation to the settlement in the State Court, no settlement was reached.

6. Therefore, unless the relief presently sought is granted, the defendants will be put in a position where, assuming a judgment approving a settlement in the *Zenn* State Court case is entered, they are, under the Court's order of October 27, 1955, forbidden to interpose that judgment in the Federal Court.

It is, therefore, respectfully submitted that the relief prayed for should be granted.

s/ F. W. H. Adams
F. W. H. Adams

Sworn to before me this

.....

11th day of September, 1956.
Notary Public

Antoinette M. Astorina
Notary Public, State of New York
No. 31-0107220
Qualified in New York County
Commission Expires March 30, 1957.

[fol. 1317]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 98-371

BRESWICK & Co., et ano.,

Plaintiffs,

—against—

O. HENRY BRIGGS, et al.,

Defendants.

Civil Action No. 107-176

BRESWICK & Co., et al.,

Plaintiffs,

—against—

ROBERT R. YOUNG, et al.,

Defendants.

Civil Action No. 101-114

BRESWICK & Co., et al.,

Plaintiffs,

—against—

UNITED STATES, et al.,

Defendants.

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

HAROLD M. KENNEDY, being duly sworn says:

I am a member of the firm of Burlingham, Hupper & Kennedy, attorneys for Thomas F. Daly in the above captioned proceedings. I have read Mr. Daly's affidavit dated September 11, 1956 and the exhibits which are annexed.

[fol. 1318] While I was not present at the meetings between counsel mentioned in Mr. Daly's affidavit and held on March 26, 1956, April 11, 1956, April 24, 1956, April 27, 1956, May 4, 1956 and May 7, 1956, I did take part in the settlement negotiations commencing on May 31, 1956 and was present on that date as well as on June 27, 1956, July 6, 1956, July 10, 1956 and also very briefly in Judge Walsh's chambers on August 1, 1956.

Mr. Daly's statement of what took place at the sessions which I did attend correctly reflect my own recollection of the matters which were discussed.

I also have been informed of what went on at the prior sessions because from time to time during the sessions which I did attend reference was made to the earlier talks.

It is my belief that Messrs. Adams and Daly were endeavoring in good faith to reach an agreement of settlement. The talks were without any rancor and all sorts of possibilities were discussed and explored in a lawyer-like way. It did seem to me that Mr. Brussel's colleagues were somewhat divided among themselves on some important phases of the negotiations. But regardless of this, it is the fact that suggestions were made which would have the effect of substantially increasing the original settlement proposals.

s/ HAROLD M. KENNEDY

Sworn to before me this
11th day of September, 1956.

Frederick W. Mueller
Notary Public, State of New York
No. 41-8046600 Queens Co.
Cert. filed with New York Co. Clerk
Term expires March 30, 1958

(SEAL)

[fol. 1319]

IN THE UNITED STATES DISTRICT COURT

PLAINTIFF'S EXHIBIT No. 22

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 98-371.

BRESWICK & Co., *et ano.*,

Plaintiffs,

vs.

O. HENRY BRIGGS, *et al.*,

Defendants.

REPORT OF SPECIAL MASTER

The undersigned, Robert J. Fitzsimmons, herein respectfully submits his report as Special Master, pursuant to an Order of this Court, made by Hon. Lawrence E. Walsh, on the 3rd day of October, 1956.

The defendants herein, in March, 1956, moved for *vacatur* of the injunctive provisions of an Order of this Court dated October 27th, 1955, pursuant to which they were enjoined from pleading as a defense in this minority stockholders action any judgment resulting from a proposed settlement which had been arrived at with the plaintiff stockholders in an action in the Supreme Court of New York County, entitled "Zenn *et al. vs.* Anzalone, *et al.*" (Index No. 7244/1954).

This Court, on March 26th, 1956, heard argument on a number of motions in the above entitled case, including the motion for an order vacating or modifying the order of October 27th, 1955, on the ground that the order had been improvidently made.

Following the arguments, this Honorable Court suggested that settlement of the entire litigation be discussed. [fol. 1320] A series of conferences between the parties hereto followed in the period from April 11th, 1956 to July 10th, 1956. No agreement of settlement was reached.

Defendants thereafter, on September 11, 1956, supplemented the original motion to vacate the order of October 27th, 1955, on the ground that in the light of the extensive settlement negotiations which they had conducted with the plaintiffs herein since the entry of the order, at which various offers of settlement were made in excess of the offer accepted by general counsel for the plaintiffs in the State Court action, the reasons for the entry of the order of October 27th, 1955 no longer existed.

This Court reserved decision on the motion of the defendants and has appointed the undersigned Special Master to hear and report to the Court on the issue of whether the order of the Court dated October 27th, 1955 "should be vacated or modified by reason of any and all matters which may have taken place since October 27th, 1955, including, without limitation, however, the details of the aforesaid settlement negotiations between plaintiffs and defendants."

The designation of the undersigned as Special Master was doubtless motivated by the fact that he is the Referee appointed by order of the Supreme Court, New York County, dated August 18, 1955, to pass on the fairness, reasonableness and adequacy of the stipulation of settlement of the State Court action of "Zenn *et al. against* Anzalone *et al.*," from which settlement and the negotiations leading thereto this Court has found that the plaintiffs herein were wrongfully excluded.

As State Court Referee, the undersigned is submitting his report to Hon. Owen McGivern simultaneously with the filing of this report.

In the State Court report the undersigned has recommended that the offer of settlement, as augmented in and following the negotiations with the Breswick plaintiffs, be approved as fair, reasonable and adequate.

[fol. 1321] Hearings before the undersigned as Special Master were held between October 30th, 1956 and November 16th, 1956, and some 675 pages of testimony were adduced. Following the close of the hearings the Special Master held his report in abeyance pending certain proceedings before a statutory three-Judge Court and the United States Supreme Court, which proceedings are reflected in the following reported decisions: Breswick & Co. *v.* United States, 134 F. Supp. 132; same case, 138 F. Supp. 123; reversed *sub nom.* Alleghany Corporation *v.* Breswick & Co., 353 U. S. 151; Breswick & Co. *v.* United States, 156 F. Supp. 227; reversed *sub nom.* Alleghany Corporation *v.* Breswick & Co., 355 U. S. 415; Breswick & Co. *v.* United States, 160 F. Supp. 754.

At the outset of this report we consider the scope and purpose of the order of reference. The defendants construe the reference as an aid to the Court in determining whether they have bargained with plaintiffs in good faith in the negotiations conducted between April and July, 1956. They assert that if the Special Master so finds, then he should recommend that the provisions of the 1955 injunctive order be lifted because the exclusion of the Breswick plaintiffs, which this Court found improper in the earlier settlement negotiations, will have been cured by their inclusion in the later negotiations. They further contend that the plaintiffs' bargaining position was greatly strengthened as compared with what it would have been if plaintiffs had participated in the earlier settlement negotiations, because they have meanwhile secured the benefit of the injunctive order in question.

Upon the plaintiffs' theory of the reference, the question before the Special Master would become one of determining the reasonableness and adequacy of the settlement offer in relation to the merits of the claims being settled. Accordingly, plaintiffs would have had the undersigned re-try on this hearing the merits of the claims being settled. I say "re-try," since I had already taken in the State Court hearings almost 5,000 pages of testimony and examined a

[fol. 1322] great number of documents on the very issue of the claims being settled in the State Court. Moreover, in the State Court hearings I allowed Mr. Brussel's associate counsel, Mr. Graubard, the broadest latitude in adducing any and all testimony relating to the merits of the claims.

Under the circumstances, I do not believe that it is appropriate to go over that task a second time, and there is nothing expressly or impliedly in the order of reference which would require or permit me to do so.

The real issue to be reviewed by me relates to the "good faith" of the defendants in the settlement negotiations. This, of course, involves a determination of whether they have made bona fide offers of settlement that represent a real and substantial increase over the offer of settlement that was accepted by general counsel for plaintiffs in the State Court proceeding.

The question of the adequacy of the augmented settlement as a basis for a judicially approved termination of the litigation has been left by this Court to the State Court, to which defendants have submitted all of the offers of settlement that the plaintiffs herein have rejected. A finding of adequacy in the State Court reference of necessity encompasses a determination of the question of the "good faith" of defendants in making the offers. To that particular question we now turn our attention.

Counsel for the plaintiffs and counsel for the defendants had ten meetings in all between April 11, 1956 and July 10, 1956. During the course of these meetings six separate and distinct offers were made by the defendants and rejected by the plaintiffs. Throughout the negotiations Mr. George Brussel, of Rosston, Hort & Brussel, represented the plaintiffs; Mr. Thomas Daly, of Lord, Day & Lord, represented defendants Briggs and Young *et al.;* Mr. Francis Adams of Satterlee, Warfield & Stephens, represented the Murchison defendants, and Judge Harold M. Kennedy was of counsel to Mr. Daly individually.

The first concrete offer of the defendants was made on April 24th and consisted of a proposed exchange by them

[fol. 1323] of 200,000 shares of New York Central stock at a discount of ½ point below the market price (*i. e.* $100,000) as of the date of exchange, for debentures of Alleghany of equivalent value, paying 5½ per cent, and convertible into common stock at the end of five years. Plaintiffs rejected the proposal on the grounds that the discount was too small; that the interest rate on the debentures was too high and in excess of the current dividend on Central common stock; and that the convertible nature of the debentures lent itself to an opportunity on the part of the defendants to enrich themselves at the end of five years at Alleghany's expense, in the event the value of Alleghany common stock should increase.

The second offer of the defendants was made on May 4th, when they suggested that Alleghany receive 200,000 shares of Central at a discount of $150,000 below market on the date of the exchange for warrants of Alleghany of a type already issued, with postponement for an undetermined time of the right to convert the warrants into common stock.

On May 7th the defendants augmented the second offer by increasing the discount to $300,000 and fixing the period of non-convertibility of the warrants at two years.

On June 22nd, 1956, an additional offer was made by the defendants. Some background information is necessary to understand it. Alleghany owned voting control of Investors Diversified Services (IDS), a Minnesota investment stock corporation. In 1955, for reasons which need not now be detailed, Alleghany exchanged 130,000 shares of its voting stock in IDS with the Murchison Brothers for 130,000 shares of non-voting stock. By this transaction it is charged that the control of IDS shifted from Alleghany to the Murchison Brothers.

The consolidated State Court Complaint, in the second and third causes of action, alleged that Alleghany made a substantial gift to the Murchisons in this exchange, and that the voting stock surrendered was worth millions of dollars more than the non-voting stock received.

[fol. 1324] Throughout the State Court hearings on the adequacy of the proposed settlement, Brussel's associate counsel, Graubard, attacked this transaction as a "pay-off to the Murchisons" for their aid to the defendants Young and Kirby in acquiring control of the New York Central Railroad. Accordingly, throughout the entire negotiations counsel for plaintiffs herein persistently demanded that the Murchisons rescind the transaction by returning to Alleghany the 130,000 shares of voting stock and receiving back their non-voting stock.

On June 22, 1956, during the course of the negotiations, defendants acquiesced in this demand of Brussel. In the course of the negotiations Daly, of counsel to Young and Kirby, pointed out to Brussel, of counsel for the plaintiffs, that in the State Court proceeding before the undersigned as Referee, Graubard, Brussel's associate, had valued the return of control of IDS to Alleghany at $5,000,000.

Counsel for plaintiffs rejected this fourth offer of defendants, on the ground that the proposed discount of $300,000 was insufficient to settle all claims except the IDS transaction, and that the return of 130,000 shares of voting stock received by the Murchison defendants in the 1955 exchange was insufficient to revest control of IDS in Alleghany without a return of the other 82,000 shares exchanged with persons other than the Murchison defendants in 1955 and a return of additional voting shares sold to the Murchisons in 1953.

The plaintiffs then received from the defendants a fifth proposal, on June 27, 1956. This offer, which included the return to Alleghany of 130,000 shares of IDS voting stock for 130,000 shares of non-voting IDS Class A stock, also embraced the transfer to Alleghany by defendants of up to 550,000 shares of New York Central common stock in exchange for Alleghany common stock, at a discount, subject to further negotiation of the parties, of something over $300,000, but in no case the discount in "seven figures," which Brussel was then demanding.

[fol. 1325] However, unlike the earlier offers, wherein the defendants were required to pay their own capital gains taxes on the transaction, the current offer would require that Alleghany give the defendants an amount of preferred stock equal to their capital gains taxes.

Counsel for plaintiffs rejected this fifth offer of settlement on July 5, 1956, and stated before the undersigned that he was motivated in part by the fact that the value of the preferred stock to be issued to defendants to meet their capital gains taxes on the exchange might wipe out any benefits that Alleghany would receive in the settlement.

Counsel for plaintiffs made certain counter proposals at the meeting of July 6, 1956, which counsel for defendants agreed to discuss with their clients, but since they involved a two point discount on a Central exchange of 550,000 shares (*i.e.* $1,110,000), the proposal on that score alone was objectionable to defendants, who had previously stated that they would never accept the seven figure discount.

Plaintiffs' counter proposal did indeed prove not acceptable to the defendants, and their counsel then made the sixth of defendants' offers of settlement at the final meeting between the parties on July 10, 1956. At that time defendants proposed:

> (I) Defendants to transfer 225,000 shares of Central stock to Alleghany Corporation at a discount of $300,000 in exchange for a new 4 per cent cumulative preferred stock of Alleghany junior to Alleghany's 6 per cent and $4 preferred stocks, which would be non-callable and non-convertible for two years, convertible thereafter into Alleghany common stock.
>
> (II) The equivalence of the new Alleghany preferred stock and the Central stock, as well as the equivalence of the Alleghany common for purposes of conversion of the preferred, would be based on market values as of the date of final approval of the settlement. [fol. 1326] The par value of the new preferred stock would be made equal to its estimated market value a

of the date of final approval of the settlement. The estimated market value of the new preferred stock, and consequently its par value, would be fixed by an independent brokerage house.

(III) Defendants were to bear their own capital gains tax.

(IV) The return of control of IDS to Alleghany, without Trusteeship, however, as suggested by Brussel.

After a consideration of these proposals during a luncheon recess, counsel for plaintiffs returned to the negotiations on the afternoon of July 10th and rejected the defendants' offer. He then made the following counter-proposal:

(I) Defendants should transfer 500,000 shares of Central stock to Alleghany.

(II) There would be no market discount on this transfer but defendants would make a cash payment to Alleghany of $1,000,000.

(III) The payment for Central stock by way of a new preferred stock was acceptable in principle to Brussel but the method of fixing the market value of such stock had to be left open because he had not had time to think about it. However, the preferred must be non-cumulative, must pay no more than three per cent, and must be non-convertible and non-callable for a period of ten years. The conversion rate, according to Brussel, should be six shares of Alleghany common for each $100 par value of the new preferred stock plus a cash payment of $3.75 per share of common to Alleghany upon conversion.

(IV) Control of IDS would be returned to Alleghany and placed in a trust, with the minority represented [fol. 1327] by Mr. Brussel on the Board of Trustees, which would have the power to vote the shares and the power to sell the shares.

(V) Defendants would have to meet their own capital gains tax.

Counsel for defendants Young and Kirby reported this counter proposal to his clients and to counsel for the other defendants. Thereafter he notified counsel for plaintiffs by telephone of their refusal to accept the proposals.

It was pointed out in this conversation that the latest counter proposal of the plaintiffs contained a lot of features which the defendants had found objectionable in the earlier offers. Counsel for defendants then stated that he was willing to continue negotiations but in view of the fact that he would submit all of the increased offers in the State Court proceeding, he did not think further offers could be made, but he would be willing to listen to any further counter proposals of counsel for the plaintiffs.

Counsel for the plaintiffs took the position that he could not trade against himself, and at this point the negotiations broke down.

Counsel for the parties met with this Court on August 1st and on August 3rd, 1956, and those meetings in chambers led to the supplemental motion which resulted in the present order of reference.

Analyzing the basic differences between the proposals of settlement advanced by the litigants, we note that they may be divided into three categories:

(I) The amount of the discount to be fixed on an exchange or a return of Central stock by the defendants.

(II) The manner and the method of payment by Alleghany for the Central common stock.

(III) The method by which control of IDS should be returned to Alleghany.

[fol. 1328] As part of the settlement involves transfer of Central stock, we are met with the question of payment by the defendants of their capital gains taxes.

Broadly stated, the defendants are willing to offer a discount of $300,000 on the exchange of 225,000 shares of Central stock to Alleghany and to bear their own capital gains taxes, estimated at approximately $1,000,000.

Plaintiffs have insisted on a discount of at least $1,000,000.

Defendants propose to rescind the 1955 IDS transaction with Murchison Brothers. Plaintiffs want the IDS voting stock to be returned to Alleghany and placed in trust with the Trustees having the power to vote the stock. Under the plaintiffs' plan, one trustee is to be selected by the stockholders represented by Brussel and one by the Board of Directors of Alleghany, with a mutually acceptable person as the third Trustee.

Plaintiffs challenge the "good faith" of the defendants in making their offers of settlement, on the ground that the amounts involved are grossly disproportionate to the value of the claims to be settled, even if proper administrative approval of all settlement proposals could be obtained, in so far as they involve the issuance of warrants, convertible debentures or a new preferred stock of Alleghany.

In this connection plaintiffs rely heavily on certain "crucial developments since October 22, 1955, * * * which have measurably enhanced the value of plaintiffs' claims." Those developments are:

> (I) The final judgment of the three-Judge statutory Court, dated December 23rd, 1955 (Breswick *vs.* United States, 138 F. Supp. 123).
>
> (II) The Securities Exchange Commission ruling on November 30, 1956, denying Alleghany's application to exempt its six per cent convertible Preferred Stock Exchange Offer from the provisions of paragraph 8(d) of the Investment Company Act.

[fol. 1329] Plaintiffs urge that these two developments "standing alone" warrant a denial of the motion to vacate the injunctive order of this Court, dated October 27, 1955.

Since these contentions have been advanced and the hearings herein closed, both of these considerations have been eliminated. The decisions of the statutory Court were reversed by the Supreme Court. Administrative control of Alleghany was held to be vested in the ICC rather than the SEC. The injunction against the issuance of Alleghany's new 6% Convertible Preferred stock was lifted and that stock was issued.

It is not necessary in this report to evaluate the effect these reversals may have on the merits of the causes of action being settled. That question goes to the appraisal of the claims and the adequacy of the proposed settlement thereof. They are part of a great many considerations bearing on the value of the claims being settled, all of which are discussed in my report to the State Court following hearings wherein these matters were thoroughly debated and briefed by Mr. Brussel's associate counsel, Mr. Graubard, in an effort to show the inadequacy of the proposed settlement in the State Court.

I believe that the additional offers made in connection with these new settlement negotiations have produced a substantial improvement over the settlement worked out by plaintiffs in the State Court; that the offers of settlement of the defendants in these new settlement negotiations were made in good faith and that they were made in an earnest desire to accomplish a fair and reasonable compromise of protracted and burdensome litigation.

I am impressed by the defendants' contention that in the initial stages of the settlement negotiations, counsel for plaintiffs made no demand that the return of IDS voting stock to Alleghany be conditioned upon a voting trust with the power of sale vested in the Trustees. Such a proposal would give to the holders of 0.7 per cent of Alleghany's outstanding common stock a voice equal to the Alleghany [fol. 1330] Board of Directors, who have been elected by all of the stockholders, in the selection of Trustees having power to vote and sell a multi-million dollar investment,

which constitutes a substantial part of Alleghany's total assets.

I do not believe that a Court of Equity in the trial of this action should impose, nor is there any reason for imposing, any such drastic conditions in connection with the rescission of the 1955 IDS transaction. In this connection, it may be pointed out that IDS, which is a publicly owned corporation, is not before the Court and no action should now be taken which would limit or abridge the right of its stockholders to act in the best interests of the corporation.

Counsel for the plaintiffs on several occasions has conceded the "good faith" of counsel for the defendants in carrying on the negotiations, but has stated his belief that their clients were not in good faith.

Plaintiffs contend that defendants' bad faith in negotiating with Brussel is demonstrable because, only a few months before settlement negotiations began on April 11, 1956, they had made a settlement offer much higher than any of those they gave to Brussel in those negotiations. This higher offer is said to have been made on December 12, 1955 at a conference between Wallace and Randolph Phillips, the latter acting for the plaintiffs. The testimony regarding the events at this conference is in sharp conflict. According to Phillips, Wallace offered to have defendants sell 300,000 Central shares to Alleghany at a discount of three points, i.e. $900,000 below market (pp. 602-3). Wallace testified that this proposal was made by Phillips, that he, Wallace, made no offer at all and that he told Phillips that he had no authority to make an offer (pp. 507-510). Notations made during the conference by both witnesses on a piece of paper (Exhibit 8) are somewhat cryptic and are likewise given contradictory interpretations by Phillips and Wallace.

In the view I take of the matter, it is unnecessary to resolve this conflict. Promptly after the conference of [fol. 1331] December 12, 1955, Phillips advised Brussel of

what had transpired (Phillips, p. 613; Brussel, pp. 211, 532). Thereafter, on April 24, 1956, Daly offered Brussel a settlement by which defendants would transfer 200,000 Central shares to Alleghany at a discount of only $100,000. Daly's offer was thus a small fraction of the earlier offer allegedly made by Wallace. Nevertheless Brussel did not confront Daly with this earlier offer; in fact, during the entire course of the Brussel-Daly negotiations the alleged Wallace offer was never referred to (Brussel, pp. 533, 554; Exhibit B, p. 1, of Brussel's affidavit of September 19, 1956). Brussel is an experienced and skillful negotiator. Had he felt that the Wallace offer was relevant to the new negotiations, he would hardly have passed it up as a weapon to extract higher offers from defendants. I must conclude either that Wallace did not make the offer ascribed to him, or that plaintiffs knew he had no authority to make it, or that plaintiffs for some other reason considered the offer as irrelevant. Inasmuch as Brussel himself in his negotiations did not allude to the Wallace offer, defendants cannot be blamed for likewise negotiating without regard to it. I find, in the light of the entire testimony, that the alleged Wallace offer does not impugn defendants' good faith in their negotiations with plaintiffs.

The extensive testimony of Mr. Daly, his demeanor on the stand, his frankness in answering the questions of counsel for plaintiffs on cross examination, lead me to the conclusion that he and his clients and counsel for the Murchisons and their clients made every reasonable effort to settle this litigation on terms that they believed to be equitable and fair.

I am impressed, however, with some of the objections advanced by plaintiffs to certain aspects of the additional offers made by defendants. The plaintiffs have strongly objected to the issuance of convertible debentures or convertible preferred stock of Alleghany in payment of the discounted value of the Central shares because of possible dilution. Defendants' answer to this objection was an offer

to make the convertible securities non-callable and non-[fol. 1332] convertible for two years. This offer does not meet the objection of plaintiffs.

Further objection is made to the use of convertible securities to be issued since the procedure would involve complex problems. It would be necessary to place a value upon these new convertible securities in order to determine the number of shares that must be issued for the discounted value of the Central shares. This would involve expert appraisals which might protract the litigation endlessly.

Defendants dispute these objections. But in order to eliminate the questions raised thereby they have (without withdrawing their previous offer) submitted a new alternative offer: Instead of transferring 225,000 Central shares to Alleghany at a discount of $300,000, they are willing to make an outright cash payment to Alleghany in the sum of $300,000. In addition, of course, the Murchison Brothers will be required to return to Alleghany the 130,000 shares of IDS voting stock hereinbefore mentioned and to take back the 130,000 shares of non-voting Class A stock of IDS. These two propositions (payment of $300,000 in cash and reversal of the 130,000 IDS share transaction) are in addition to the terms of the original offer submitted to the State Court.

In the report which I am submitting to the State Court as Referee I am recommending the approval of the proposed settlement as augmented by defendants' latest offer. My report to the State Court sets forth the reasons why I believe that a $300,000 cash payment is preferable to a transfer of 225,000 Central shares to Alleghany at a discount of $300,000.

The fact that during the hearings before me defendants added their latest alternative offer to those previously made in their negotiations with the Breswick plaintiffs does not, in my opinion, reflect or indicate any lack of good faith on defendants' part in making their previous offers of settlement. The new alternative offer simply represents

an effort on defendants' part to work out a feasible and practical solution which avoids the complexities of the [fol. 1333] earlier offers without diminishing the benefits they were designed to confer on Alleghany.

The Breswick plaintiffs object to the $300,000 cash payment on the ground that, during the negotiations of June 27, 1956, Daly had suggested a discount for the Central stock "somewhat over $300,000". From this suggestion plaintiffs derive that defendants' ultimate offer of $300,000 was not their best offer and was therefore not made in good faith. Plaintiffs overlook, however, that defendants' willingness to go above $300,000 was subject to the proviso that Alleghany reimburse them for their capital gains tax on the Central shares. Since defendants now forego this advantage, they cannot well be held to a payment in excess of $300,000. Furthermore, on the occasion in question Daly told Brussel that he would discuss a payment or discount in excess of $300,000 only if Brussel on his part would reduce his demand to an amount less than seven figures, i.e., less than $1,000,000. Brussel never agreed to such a reduction. Defendants cannot be blamed for adhering to their $300,000 offer so long as they had no reason to expect that a further increase of their offer would bring them within hailing distance of Brussel's asking price.

In my opinion defendants' new offers of settlement constitute an appropriate basis for compromise of the litigation, and I have so reported in the State Court reference.

When we consider that the original settlement offer, subject to approval in the State Court action, was valued at $1,000,000 by the parties, and that the offers in the negotiations in the Federal Court action augment that figure by $300,000, in addition to the benefit to Alleghany of the exchange of 130,000 shares of non-voting stock for voting stock of IDS, evaluated by Brussel and Graubard respectively at $1,750,000 and $5,000,000, the new offers of settlement are indeed substantial.

The progress of the negotiations convinces me that defendants sought earnestly to meet the objections of the plaintiffs to the various offers of settlement. I can find no fault with the manner in which the defendants conducted [fol. 1334] the settlement negotiations, and I report that they acted in complete good faith.

It is my judgment that in the light of subsequent events and negotiations, whatever injury Alleghany may have suffered through the exclusion of the Breswick plaintiffs from the original settlement negotiations has been repaired.

It is reasonable to assume that in the subsequent negotiations, armed as they were with the injunction order of this Court and the decision of the three-Judge statutory Court, plaintiffs commanded more attention and respect from the defendants than had they joined general counsel or the State Court plaintiffs in the original settlement negotiations. In any case, by their efforts they have produced a substantial increase in the original settlement, and that settlement, as so augmented, I have recommended to the State Court as being fair and reasonable.

In the light of the foregoing, I therefore respectfully recommend to this Court that by reason of the negotiations and other events since October 27, 1955 it vacate its injunctive order of October 27th, 1955.

Respectfully submitted,

/s/ Robert I. Fitzsimmons

New York, N. Y.
Dated November 17, 1958

[fol. 1335]

IN THE UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT No. 23

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 98-371

BRESWICK & Co. et ano.,

Plaintiffs,

—against—

O. HENRY BRIGGS, et al.,

Defendants.

OBJECTIONS TO MASTER'S REPORT

SIRS:

PLEASE TAKE NOTICE that plaintiffs Breswick & Co. and Myron Neisloss object to the report of the Honorable ROBERT J. FITZSIMMONS, Special Master, filed herein on November 18, 1958, in the following respects:

Objection No. 1

In view of the Special Master's finding as Referee in the State Court action of Zenn v. Anzalone that it is not "a proper function" for the Court in a settlement proceeding to approve a purchase of securities by defendant Alleghany Corporation and that the Court "should not be asked to approve a change" in its capital structure (State Court Referee's Report, pp. 119-120) and in view of the Master's finding that all offers made by defendants during the settlement negotiations required such a purchase and change (Master's Report, pp. 4-8), the Special Master erred in finding "no fault with the manner in which the

defendants conducted the settlement negotiations" and "that they acted in complete good faith." (Report, pp. 15, 16)

[fol. 1336]

Objection No. 2

The Special Master erred in failing to find that plaintiffs were obliged to reject the offers made by defendants during the settlement negotiations because such offers would have enriched the individual defendants at the expense of defendant Alleghany Corporation and would otherwise have improved the position of the individual defendants, and because, on the implementation and consummation of such offers defendant Alleghany Corporation would have been required to effect purchase of securities and to change its capital structure, neither being properly the subject of an offer of settlement herein.

Objection No. 3

The Special Master's finding (Report, pp. 11, 13, 15, 16) that the defendants had in good faith negotiated a settlement of this action with counsel for the plaintiffs was erroneous in that said finding:

(a) was based upon findings independently made by said Special Master in his capacity of Referee in the State Court action of Zenn v. Anzalone upon a record of testimony and exhibits not made part of the record in this proceeding (Report, pp. 2, 11, 15);

(b) was based on an event occurring subsequent to October 3, 1956, the date of the order of this Court appointing the Special Master, namely, the cash offer of $300,000 made in open Court on July 17, 1958.

[fol. 1337] (c) was unsupported by any substantial evidence;

(d) failed to give recognition to the admission by the defendants (Record, p. 169) that defendants' good faith in

such negotiations was ascertainable only by reference to the merit or lack of merit in the claims being settled and failed to determine the merit or lack of merit of such claims in this proceeding;

(e) disregarded defendants' failure to sustain their burden of establishing that such claims were worth only $300,000, plus rescission of the IDS stock exchange;

(f) lacked any supporting finding that defendants acted in good faith in rejecting the Brussel offers of April 11, 1956 (Record, pp. 25-27), of April 27, 1956 (Record, pp. 32-34), and of June 27, 1956 (Record, pp. 47-48).

Objection No. 4

The Special Master erred in excluding (Record, pp. 235-239) plaintiffs' Exhibit No. 2 for identification and plaintiffs' offer of proof with respect thereto (Record, pp. 232-234), upon the ground that such proof tended to establish that subsequent to October 27, 1955, defendants had submitted false testimony to the Special Master sitting as Referee in the State Court action of Zenn v. Anzalone with respect to proceedings of the Executive Committee of the Board of Directors of defendant Alleghany Corporation on March 12, 1954, and with respect to the nature of the put [fol. 1338] (right to sell) granted by defendant Alleghany Corporation to the Murchison defendants in respect of 200,000 shares of New York Central Railroad Company common stock, in that the exhibit so excluded tended to establish that on March 12, 1954, defendant Alleghany Corporation, acting with the prior knowledge and consent of defendant Young, had authorized the granting by defendant Alleghany Corporation to the Murchison defendants of the unconditional right to put to defendant Alleghany Corporation 200,000 shares of New York Central Railroad Company common stock, said minutes being contrary to testimony given by defendant Young upon deposition in this Court in Zenn vs. Anzalone (Civil Action No.

92-205) and by defendant Murchison before the Special Master sitting as such Referee, to the effect that the granting of such unconditional put had been without the prior knowledge and consent of defendant Young, and upon the further ground that the excluded proof would have tended to establish bad faith on the part of the defendants in the settlement negotiations herein and the unfairness of the defendants' offers.

Objection No. 5

The Special Master erred in excluding (Record, p. 239) plaintiffs' Exhibit No. 3 for identification consisting of pages 123 and 124 of the deposition of Robert R. Young in this Court in the case of Zenn vs. Anzalone (Civil Action No. 92-205) upon the ground that the proof so excluded would have tended to establish the false nature of proof [fol. 1339] and testimony submitted to the Special Master, sitting as Referee in the State Court action of Zenn v. Anzalone and consisting, in part, of said deposition containing false testimony by defendant Young that said defendant did not have knowledge of or consent to the granting by defendant Alleghany Corporation to the Murchison defendants of said unconditional right to put to defendant Alleghany Corporation 200,000 shares of common stock of New York Central Railroad Company; and upon the further ground that such proof would have tended to establish bad faith on the part of the defendants in the settlement negotiations herein and the unfairness of the defendants' offers.

Objection No. 6

The Special Master erred in excluding generally (Record, pp. 239-240) all proof that, subsequent to October 27, 1955, certain of the defendants had submitted false testimony to the Special Master, sitting as Referee in said State Court action of Zenn v. Anzalone, upon the ground that such proof would have tended to establish bad faith

on the part of the defendants in the settlement negotiations herein and the unfairness of the defendants' offers.

Objection No. 7

The Special Master erred in sustaining defendants' objection (Record, p. 151) to the question propounded by counsel for the plaintiffs upon the ground that the answer to such question would have tended to establish the neces-
[fol. 1340] sity for receiving in evidence the testimony excluded by the Referee with respect to false testimony submitted by certain of the defendants in said State Court action of Zenn v. Anzalone, including the testimony referred to in Objections 3, 4 and 5.

Objection No. 8

The Special Master erred in sustaining defendants' objection to the question propounded by counsel for the plaintiffs at p. 146 of the Record which sought to elicit from such counsel the amount which defendants were prepared to pay in settlement of plaintiffs' claims in excess of the sum of $300,000 offered in settlement herein, upon the ground that such testimony, together with other testimony appearing at pages 23, 104, 113, 114, 118, 136, 145-147, 149, 318, 326, 331, 335, 336 and 565 of the Record would have tended to establish that the defendants in fact never made their best offer to counsel for the plaintiffs during the course of the settlement negotiations herein and intentionally withheld it in the expectation of obtaining a vacatur of the order of this Court dated October 27, 1955, without being required to make their best offer.

Objection No. 9

In finding (Report, p. 15) that defendants were not required to make their best offer above $300,000 because plaintiffs' counsel had refused to reduce plaintiffs' counter-
[fol. 1341] offer below $1,000,000, the Special Master ap-

plied an incorrect standard and failed to apply the correct one, i.e., whether the supervening interest of defendant Alleghany Corporation required acceptance of defendants' offer of $300,000 even though such offer was not the best offer defendants were prepared to make.

Objection No. 10

The Special Master erred in finding (a) (pp. 12-13) that defendant Young, through Wallace, did not offer to permit defendant Alleghany Corporation to purchase 300,000 shares of New York Central Railroad Company stock from the defendants at a discount of $900,000; (b) that plaintiffs knew that Wallace had no authority to make such offer, there being no evidence to support either finding and there being a preponderance of evidence to the contrary.

Objection No. 11

In finding that the Wallace offer had not been made or had not been authorized (Report, p. 13), the Special Master erred in failing to give weight to defendants' failure to tender defendant Young in rebuttal of Phillips' testimony and to the permissible inference therefrom, viz., that, had defendant Young been called, he would have testified unfavorably to the defendants on this point.
[fol. 1342]

Objection No. 12

The Special Master erred in rejecting plaintiffs' offer of proof through the witness Randolph Phillips:

1. To the effect that defendants Young and Kirby had never made a bona fide offer to turn over to defendant Alleghany Corporation at their cost the 200,000 shares of New York Central Railroad Company common stock which said defendants purchased for themselves prior to January 19, 1954 upon the ground that such proof would have tended to establish bad faith on the part of the defendants

in the settlement negotiations herein and the unfairness of defendants' offers (Record, pp. 618-620).

2. To the effect that defendant Young had not dealt at arm's length with Chesapeake and Ohio Railroad Company in respect of the divestiture of 800,000 shares of New York Central Railroad Company common stock owned by the Chesapeake and Ohio Railroad Company in January 1954, upon the ground that such proof would have tended to establish bad faith on the part of the defendants in the settlement negotiations herein and the unfairness of defendants' offers (Record, pp. 619-620).

3. To the effect that, contrary to testimony contained in the deposition of defendant Young in the action in this Court entitled Zenn v. Anzalone (Civil Action No. 92-205), the right granted by Alleghany to the Murchison defendants to put to Alleghany Corporation 200,000 shares of New [fol. 1343] York Central Railroad common stock had been given with the prior knowledge and consent of the defendant Young, upon the ground that such proof would have tended to establish bad faith on the part of the defendants in the settlement negotiations herein and the unfairness of the defendants' offers (Record, pp. 620-623).

4. With respect to personal and telephone conversations between the witness and defendant Young and between defendant Young and one Walter Tuohy, President of Chesapeake and Ohio Railroad Company concerning the divestiture by Alleghany of its control of Chesapeake and Ohio Railroad Company in January 1954, upon the ground that such testimony would have tended to establish that defendant Young had not dealt at arm's length with Cyrus Eaton, Chairman of the Board of Directors of Chesapeake and Ohio Railroad Company in arranging such divestiture, and upon the further ground that such proof would have tended to prove defendants' bad faith in the settlement negotiations and the unfairness of defendants' offers (Record, pp. 624-5).

Objection No. 13

The Special Master erred in rejecting plaintiffs' offer of proof through the witness defendant Kirby:

1. To the effect that testimony of defendant Young given at pages 123 and 124 of the deposition of defendant Young in the action in this Court of Zenn v. [fol. 1344] Anzalone (Civil Action 92-205) and offered by defendants in the State Court action, had been false insofar as defendant Young testified that the unconditional put of 200,000 shares of New York Central common stock granted by defendant Alleghany Corporation to defendant Clint W. Murchison had been executed by defendant Alleghany Corporation without the knowledge and consent of defendant Young and that knowledge of such put came to defendant Young for the first time when enroute to Texas in May or June 1954 (Record, pp. 626, 637);

2. To the effect that, as President of defendant Alleghany Corporation, defendant Kirby had been informed of said put by defendant Young prior to March 15, 1954, and that, upon representation to defendant Kirby by defendant Young of the necessity for granting such put, defendant Kirby had agreed thereto, and that such agreement had been based upon representations by defendant Young to defendant Kirby with respect to the content of the put itself (Record, pp. 628, 637);

3. To the effect that defendant Robert R. Young arranged with defendants Clint W. Murchison and Sidney W. Richardson for an equality of transactions between them with respect to the 800,000 shares of New York Central stock purchased by them from Chesapeake and Ohio Railroad Company, that is to say, that said Murchison and Richardson each would have the same protections and immunities in equal amounts under the arrangements set forth in the put and joint venture

[fol. 1345] documents marked in evidence in the State Court action of Zenn v. Anzalone; for instance, that defendant Clint W. Murchison would acquire 400,000 shares of New York Central Railroad Company stock for his account, and that defendant Richardson would acquire 400,000 shares of New York Central Railroad Company stock for his account; that each of said defendants would receive from Alleghany Corporation an unconditional right to put to Alleghany Corporation 200,000 shares thereof, i.e., an unconditional put by defendant Murchison to Alleghany Corporation of 200,000 shares and an unconditional put by defendant Richardson to defendant Kirby of 200,000 shares, and that with respect to the remaining 200,000 shares owned by defendant Murchison, said defendant would be granted an unconditional right to put 100,000 shares to defendant Alleghany Corporation provided that an additional 100,000 shares thereof were contributed by defendant Murchison to said venture; and that a similar arrangement had in fact been made with defendant Alleghany Corporation in respect of the 200,000 shares of New York Central stock remaining with defendant Richardson (Record, pp. 629, 637);

4. To the effect that, as President of defendant Alleghany Corporation and as a member of the Executive Committee of its Board of Directors, defendant Kirby [fol. 1346] had been informed of the facts set forth in Subdivision 3 above, and that with such knowledge, defendant Kirby participated in the deliberations of said Executive Committee relating to the granting of said puts and consented thereto (Record, pp. 630, 637);

5. To the effect that the tenders of the 100,000 shares of New York Central stock acquired by defendant Young in December 1953 and up to January 18, 1954, and of the 100,000 shares of New York Central stock acquired by defendant Kirby in December 1953 and up to January 18, 1954, alleged to have been made at the

January 19, 1954 meeting of the Board of Directors of defendant Alleghany Corporation at a price representing the cost of said shares to defendants Young and Kirby, were not bona fide, assuming that any such tender was ever made (Record, pp. 630-631, 637);

6. To the effect that testimony given by defendant Young in said State Court action subsequent to October 27, 1955 was false insofar as said defendant testified that the July 1954 revision of the agreements among defendants Alleghany Corporation, Clint W. Murchison and Sidney W. Richardson granting the right to put said New York Central shares to defendant Alleghany Corporation, had been intended to reflect the March 1954 agreements with respect thereto as actually made at that time (Record, pp. 631, 637);

[fol. 1347] 7. To the effect that the issuance of the 6% Convertible Preferred stock of Alleghany Corporation while a motion for an injunction against issuance thereof was actually pending, had been effected with the prior knowledge and consent of defendants Young and Kirby contrary to testimony to the contrary given in said State Court action subsequent to October 27, 1955 by defendant Young and by one David W. Wallace (Record, pp. 631, 637);

8. To the effect that testimony given in said State Court action subsequent to October 27, 1955 by defendant Young to the effect that defendant Young had not theretofore received offers for the sale by defendant Alleghany Corporation of its controlling voting stock in Investors Diversified Services, Inc. at a substantial profit to defendant Alleghany Corporation was false (Record, pp. 631-633, 637);

9. To the effect that defendant Young had not dealt at arm's length with the Murchison defendants with respect to the sale of shares of Investors Diversified Services, Inc. by defendant Alleghany Corporation to

the Murchison defendants and that the sale by defendant Alleghany Corporation in December 1953 of 24% of the voting stock of Investors Diversified Services, [fol. 1348] Inc. to defendant Murchison Brothers on the one part, was related to and in consideration of the proxy campaign to be conducted and, in 1954, actually conducted by defendants Young and Kirby for control of the New York Central Railroad Company and the assistance, cooperation and the issuance of proxies for 800,000 shares of New York Central Railroad Company by the Murchison defendants on the other part (Record, pp. 633-635, 637);

upon the ground that such proof would have tended to establish that, subsequent to October 27, 1955, false testimony in respect of the foregoing had been submitted to the Special Master as Referee in the State Court action, and that the defendants had negotiated in bad faith in the subsequent settlement negotiations and that the settlement proposed by the defendants was unfair.

Objection No. 14

The Special Master erred in rejecting plaintiffs' offer of proof through the witness, defendant Young, to the same effect as plaintiffs' offer made in respect of the witness Kirby, comprehended by Objection No. 13 (Record, pp. 635, 637), upon the same grounds stated in said objection.

Objection No. 15

The Special Master erred in finding expressly or by necessary implication (Report, pp. 3, 4) that plaintiffs in this proceeding were not entitled to present proof with respect [fol. 1349] to the merits of the claims asserted against the defendants and that plaintiffs were debarred from so doing because they had not availed themselves of the opportunity of presenting such proof in the State Court action.

Objection No. 16

The Special Master erred in finding (Report, p. 4) that the finding made by him as Referee in the State Court action that the offers made by defendants in that action were adequate, is determinative of defendants' good faith in the settlement negotiations in this action.

Objection No. 17

To the extent that the supplemental cash offer of $300,000 made on July 17, 1958 constituted the basis of the Special Master's finding that defendants had in 1956 negotiated with plaintiffs' counsel in good faith during the settlement negotiations, such finding:

(a) disregarded admissions by defendants that the proposal made by defendants during the settlement negotiations to sell to defendant Alleghany Corporation 225,000 shares of stock of New York Central Railroad Company at a market discount of $300,000 in exchange for shares of convertible preferred stock of defendant Alleghany Corporation had a minimum cash value to defendant Alleghany Corporation of $480,000 in 1956 (Record, pp. 178, 179);

(b) disregarded the element of value allocable to the acquisition, en bloc, of the 225,000 shares of New York Central Railroad Company stock referred to in subdivision (a) [fol. 1350] hereof (Record, p. 174);

(c) ignored the fact that such $300,000 cash offer had not been made during the settlement negotiations but two years after the negotiations had terminated and a year and a half after the close of the hearings herein and subsequent to October 3, 1956, the date of the order in this Court appointing the Special Master, and was thus outside the scope of the reference;

(d) is erroneously predicated on the supporting finding (Report, pp. 14-15) that said $300,000 cash offer "avoids the complexities of the earlier offers without diminishing the benefits they were designed to confer on Alleghany".

Objection No. 18

To the extent that the offer of the Murchison defendants to exchange 130,000 shares of voting stock of Investors Diversified Services, Inc. for an equivalent number of shares of non-voting stock of Investors Diversified Services, Inc., owned by defendant Alleghany Corporation constituted the basis of the Special Master's finding that defendants had negotiated with plaintiffs' counsel in good faith during the settlement negotiations, such finding lacked supporting findings as to the percentage of control of Investors Diversified Services, Inc. in fact represented by such voting stock, and by other voting stock presently owned by Alleghany, and as to the value to defendant Alleghany Corporation, either as of the date of the offer or the date of the Master's report, of the restoration of control assumed to be inherent therein.
[fol. 1351]

Objection No. 19

The Special Master erred in failing to require proof from the defendants or to take proof independently with respect to the value to defendant Alleghany Corporation of the reversal of the 130,000 Investors Diversified Services, Inc. share transaction and, notwithstanding such failure, in finding (Report, p. 15) that such reversal constituted a substantial offer of settlement.

Objection No. 20

The Special Master erred:

(a) in failing to find that the rejection of plaintiffs' proposal for trusteeing the voting stock of Investors Diversified Services, Inc. held by defendant Alleghany Corporation constituted bad faith on the part of the defendants in relation to their offer to reverse the 130,000 share transaction;

(b) in finding that defendants' rejection of plaintiffs' proposal for trusteeing said shares was justified because

plaintiffs represented only 0.7 per cent of the common stock of defendant Alleghany Corporation;

(c) in finding that defendants' rejection of plaintiffs' said proposal was justified because Investors Diversified Services, Inc. is not subject to the jurisdiction of the Court.

Objection No. 21

Plaintiffs object to the confirmation of the report of the [fol. 1352] Special Master as a whole upon the ground:

(a) That the question of whether the order of this Court dated October 27, 1955 should be vacated or modified by reason of events subsequent to October 27, 1955, including the settlement negotiations between plaintiffs and defendants, was a question not properly referrable to a Special Master and which should have been, and should now be, decided by the Court upon the papers and argument upon defendants' motion to vacate said order;

(b) That defendants' motion, if granted, and the Special Master's report, if confirmed, would avoid the application of Rule 23(c) of the Federal Rules of Procedure and subvert the jurisdiction of this Court to pass upon the adequacy of the defendants' offers of settlement.

January 13, 1958. [1959]

Yours, etc.,

ROSSTON, HORT & BRUSSEL

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Attorneys for plaintiff Clarence W. Bailey,
477 Madison Avenue,
New York City

[fol. 1353]

IN THE UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT NO. 27

#603

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 98-371

BRESWICK & Co., *et ano.*,

Plaintiffs,

against

O. HENRY BRIGGS, *et al.*,

Defendants.

MEMORANDUM

DIMOCK, D. J.

These are opposing motions, one to confirm and the other to reject the report of Robert J. Fitzsimmons, Esq., Special Master, recommending the vacating of an injunction order. The action is one of multiple similar stockholders' derivative actions brought in the right of Alleghany Corporation in several courts against the same defendants. The plaintiffs in this action will be referred to as "the Breswick plaintiffs". A number of the actions pending in the New York Supreme Court have been consolidated and a settlement agreement has been reached therein without negotiation with the Breswick plaintiffs. On October 27, 1955, Judge Walsh issued in the instant case an order enjoining defendants from pleading in bar of this suit any judgment based on a settlement not negotiated with them. On October 3, 1956, Judge Walsh made an order appointing Mr. Fitzsimmons Special Master to report on the issue whether the injunction order of October 27, 1955 should be vacated.

[fol. 1354] The injunction order was issued by Judge Walsh because he found that the parties to the state court

settlement had unfairly excluded the Breswick plaintiffs from the settlement negotiations. Its exact terms were that defendants were enjoined from pleading as a bar to this suit any judgments entered pursuant to "an agreement not negotiated with plaintiffs or their counsel". See 135 F. Supp. 397, 406.

This in effect gave to the Breswick plaintiffs veto power over any settlement to which they did not agree. The defendants, as a practical matter, would never pay the price of settlement to the state court plaintiffs when they would still have to face exactly the same issues asserted this time by the Breswick plaintiffs. Hence no settlement not agreed to by the Breswick plaintiffs was possible. This was in sharp distinction from the usual situation where a defendant, named in multiple stockholders' derivative actions, can choose the plaintiff with whom he will deal in making a settlement which will bind all plaintiffs in all suits. See Stella v. Kaiser, 2 Cir., 218 F. 2d 64.

The time came when the parties to the state court action actually did negotiate with the Breswick plaintiffs. As a result of those negotiations defendants offered to the Breswick plaintiffs improvements on the terms of the state court settlement agreement. The Breswick plaintiffs still refused to agree to settle but the improvements were added to the terms of the state court settlement, the adequacy of which was then being considered by Mr. Fitzsimmons as Referee in the state court. Thereupon defendants moved to vacate the injunction and it was then that Judge Walsh appointed Mr. Fitzsimmons Special Master to hold hearings and report to the court on the issue whether the injunction order of October 27, 1955 "should be vacated or modified by reason of any and all matters which may have taken place since October 27, 1955, including, without limitation, however, the details of the aforesaid settlement negotiations between plaintiffs and defendants".

[fol. 1355] The Special Master has reported in favor of vacating the injunction and the parties' respective motions to confirm and reject the report are before me.

The Special Master's subsidiary findings deal almost exclusively with the question whether defendants, by making substantial additions to their existing offer of settlement, demonstrated that they were acting in good faith. The only other basis assigned for a finding of good faith was the demeanor before the Special Master of one of the counsel for defendants when he was on the stand.

What Judge Walsh wanted to learn from the Special Master was whether that which had constituted the basis for the injunction had been eliminated by later conduct of defendants. It is important to know, therefore, what constituted the basis for the injunction. Judge Walsh said that the existing settlement agreement had not been shown to be collusive. 135 F. Supp. 397, 403. His sole ground for issuance of the injunction was the exclusion of the Breswick plaintiffs from the negotiations. He said, p. 403:

> "Nevertheless, the conduct of defendants was inequitable, and they should not be permitted to profit by it. There was no proper reason for excluding plaintiffs' counsel from the negotiations. Substantially all of the other derivative actions had been consolidated and the lawyer with whom the defendants negotiated the settlement had been designated as general counsel. In this sense, all of the other litigating stockholders were represented at the bargaining table, whereas the present plaintiffs, who perhaps had been the most vigorous and most successful in the litigation, were left out."

The question is, therefore, as expressed by the Special Master, whether any injury suffered by Alleghany Corporation through the original exclusion of the Breswick plaintiffs had been repaired by the negotiations. The answer [fol. 1356] must depend upon whether defendants listened sympathetically to the Breswick plaintiffs in the negotiations. That is a hard issue to decide on testimony. It is not susceptible of objective proof. The inferences to be drawn from increases in the settlement offer or refusal

to increase it do not constitute a perfect criterion. The existing settlement offer might still have represented all that the defendants honestly thought the case was worth even after listening sympathetically to the Breswick plaintiffs. Then there would have been no increase in defendants' offer which would act as an outward sign of their inward grace. Nevertheless, since we cannot look into the minds of defendants, we must draw inferences from their acts. The Special Master can hardly be blamed for resting almost everything on the outward sign furnished by the increases in the offer which were obtained as a result of the negotiations. He said that the increases were substantial and presumably concluded that defendants were sympathetic listeners. The decision whether or not the increases were substantial, however, involves an estimate of the value of the case. An increase of a million dollars over a five hundred thousand dollar offer would not indicate sympathetic listening where the reasonable value of the case was ten million dollars. Since he accorded so much weight to the substantiality of the increases agreed to by defendants, the Special Master erred in refusing to permit the Breswick plaintiffs to offer evidence to show that the value of the whole case far exceeded the total that was being offered in settlement.

Whether or not Judge Walsh wanted a finding as to the adequacy of the settlement offer, the theory of the Special Master's report makes consideration of that question a necessary incident to the decision. The Special Master's finding of substantiality of the additions to the offered settlement is insupportable in the light of the Special Master's refusal to give to the Breswick plaintiffs the opportunity to show that the additions were not substantial in relation to the value of the whole claim.

[fol. 1357] The matter must be remitted to the Special Master, for a new finding as to whether the injunction should be dissolved, after hearing the Breswick plaintiffs on the question of the settlement value of the whole case and its relation to the value of the additional offers. Mr.

Fitzsimmons as state court referee, by a report filed in the state court simultaneously with the filing in this court of the report under review, has already passed favorably upon the question of adequacy and in his report as special master he naturally deprecates starting on it anew. Theoretically that would be necessary since the Breswick plaintiffs were not parties to the proceeding in which the Referee made the finding of adequacy. Defendants make the point that the Breswick plaintiffs were actually represented in the state proceeding by reason of the fact that their counsel appeared there as associate counsel for another party and could have offered any evidence that he chose. At that time, however, these motions to vacate the injunction order had not been made and the Breswick plaintiffs were insulated by it from any effect of the state suit settlement. Hence the state court proceedings to confirm it were comparatively unimportant to them. While a complete rehearing is therefore theoretically required, the Breswick plaintiffs have offered to stipulate for the use of the record in the state court proceeding with appropriate safeguards, such as the right to rebut and explain the state court evidence and to supplement it by the testimony of important witnesses.

The report of the Special Master is rejected and the matter remitted to him for the proceedings indicated in this opinion.

So ordered.

Dated: September 22, 1959.

E. J. Dimock
United States District Judge

[fol. 1358]

IN THE UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT No. 28

317—Consent of Substitution of Attorney.
Rule 56 of Rules of C. P. A. as amended.

[Stamp—U. S. District Court—Filed Dec 22 1959—S. D. of N. Y.]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 98-371

BRESWICK & Co., et al,

Plaintiffs

against

O. HENRY BRIGGS, et al,

Defendants

It is hereby stipulated and consented that DONOVAN LEISURE NEWTON & IRVINE, Esqs. of No. 2 Wall Street, New York 5, New York, be and hereby are substituted in place and stead of LORD DAY & LORD as attorneys for the Defendant ALLAN P. KIRBY in the above entitled action and that this substitution be entered into effect without further notice.

/s/ ALLAN B. KIRBY
/s/ LORD, DAY & LORD

Consent must be signed by attorney of record and signed and acknowledged by party.

So ORDERED: 12/22/59

/s/ HERBERT A. CHARLSON
Clerk

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

On the 17th day of December, 1959, before me personally came ALLAN P. KIRBY to me known, and known to me to be the same person described in and who executed the foregoing consent and acknowledged to me that he executed the same.

/s/ ANNE L. JOOST
Anne L. Joost
Notary Public, State of New York
No. 41-2000250
Qualified in Queens County
Commission Expires March 30, 1961

[fol. 1359]

IN THE UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT No. 29

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

BRESWICK & Co., et al.,

Plaintiffs,

—against—

O. HENRY BRIGGS, et al.,

Defendants.

ORDER TO SHOW CAUSE

On the annexed affidavit of David Teitelbaum, verified the 22nd day of December, 1959 and the papers attached thereto consisting of a "Supplemental Stipulation of Set-

tlement" and a proposed form of order, and on all the proceedings heretofore had herein, and on a motion of Donovan Leisure Newton & Irvine, attorneys for the defendant Allan P. Kirby, L E T the plaintiffs and co-defendants herein show cause, before this court, in Room 1105, United State Courthouse, Foley Square, Borough of Manhattan, State, County and City of New York, on the 23rd day of December, 1959, at 2:15 o'clock in the afternoon, or as soon thereafter as counsel can be heard, why an order should not be made and entered herein, vacating the order heretofore made and entered herein on October 27, 1955 as to defendant Allan P. Kirby upon the conditions set forth in the proposed form of order annexed to the aforesaid affidavit of David Teitelbaum.

BE IT ORDERED, that a copy of this order, together with a copy of the aforesaid affidavit of David Teitelbaum and the papers attached thereto be served upon the plaintiffs and co-defendants herein on or before 7:00 o'clock p.m. on the 22nd day of December, 1959, and that such service be deemed good and sufficient service hereof.

Dated: New York, New York
December 22, 1959

E. J. DIMOCK
U.S.D.J.

[fol. 1360]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 98-371

BRESWICK & Co., et al.,

Plaintiffs,

—against—

O. HENRY BRIGGS, et al.,

Defendants.

AFFIDAVIT

STATE OF NEW YORK
COUNTY OF NEW YORK *ss.*:

DAVID TEITELBAUM, being duly sworn, deposes and says:

I am a member of the firm of Donovan Leisure Newton & Irvine, attorneys for defendant Allan P. Kirby herein. This affidavit is made in support of the application for an order to show cause herein why the order of this Court of October 27, 1955 should not be vacated as to defendant Kirby upon the terms and conditions of the proposed form of order annexed hereto and made a part hereof.

Annexed hereto and made a part hereof is a copy of a Supplemental Stipulation of Settlement which has been entered into between Allan P. Kirby, and the objectant, and Alleghany Corporation in the action entitled *Zenn* v. *Anzalone* in the Supreme Court of the State of New York, County of New York (Index No. 7244/1954). The Supplemental Stipulation of Settlement is self-explanatory. Basically, it provides for affirmation by defendant Kirby of the terms of the present settlement which has been ap-
[fol. 1361] proved by that Court, plus an additional payment by Allan P. Kirby of the sum of $1,100,000. The basic settlement had previously been accepted by the plaintiffs

in the State Court action and approved by the Court therein. The present Supplemental Stipulation of Settlement with respect to Allan P. Kirby is acceptable in all respects to the objectant in the State Court action and, I am advised, to the plaintiffs in this action. Consequently the plaintiffs in this action have agreed to consent to the vacation as to defendant Allan P. Kirby of the order of this Court of October 27, 1955 which otherwise precludes consummation of the settlement of the State Court action as to defendant Allan P. Kirby on the terms and conditions provided for in the Supplemental Stipulation of Settlement.

The settlement with Allan P. Kirby contemplated and provided for in the Supplemental Stipulation of Settlement can be consummated and put into effect only if it is accomplished prior to December 31, 1959. It cannot be presented to the State Court until after an order of this Court has been obtained vacating the aforesaid order of this Court of October 27, 1955 as to defendant Kirby. For that reason it is not possible to provide for any delay in coming before this Court which might be entailed by the giving of five days notice, and it is necessary that an order to show cause issue.

The terms of the settlement embodied in the Supplemental Stipulation of Settlement for the additional contribution by defendant Kirby, were negotiated with counsel for the plaintiffs in this action and counsel for the objectant in the State Court action. Those negotiations were not completed until late on Sunday night, December 20, [fol. 1362] 1959, with some details remaining incompleted even then. It consequently was not possible to come before this Court any sooner than the time of the instant application. Counsel for the other defendants in this action, however, were orally advised of the basic terms of the settlement embodied in the Supplemental Stipulation of Settlement on Monday morning, December 21, 1959.

For the foregoing reasons it is submitted that the application for an order to show cause should be granted.

.....

Sworn to before me this 22nd
day of December 1959.

.....

Notary Public

SHEILA ANN HIGGINS
Notary Public, State of New York
No. 31-1793150
Qualified in New York County
Commission Expires March 30, 1961

[fol. 1363]

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Index No. 7244/1954

SADIE ZENN, et al.,

Plaintiffs,

—against—

J. J. ANZALONE, et al.,

Defendants,

SAMUEL R. ROSEN,

Objectant.

COUNTY OF NEW YORK

WHEREAS, on July 25, 1955, plaintiffs and defendants herein agreed in settlement of this action that the individual defendants herein would pay to defendant Alleghany Corporation the sum of $700,000 and other considerations; and

WHEREAS, by order entered in the United States District Court for the Southern District of New York (*Breswick &*

Co., et al v. *Briggs,* Civil Action No. 98-371, hereinafter referred to as the "Breswick action") on October 27, 1955 the District Court enjoined the defendants therein from pleading as a defense therein any judgment resulting from the proposed settlement herein, but providing that any amount paid in settlement of this action should be applied in reduction of any judgment obtained in said Breswick action; and

WHEREAS, pursuant to order of this Court dated August 18, 1955, hearings were held before a Referee on the fairness and adequacy of said settlement of July 25, 1955; and

[fol. 1364] WHEREAS, Samuel R. Rosen, a stockholder of Alleghany, appeared by his undersigned counsel at said hearings and interposed objections to approval of the aforesaid settlement; and

WHEREAS, on June 22, 1956 defendants Murchison Brothers agreed in settlement of the action herein to deliver to Alleghany Corporation 130,000 shares of the voting stock of Investors Diversified Services, Inc. (hereinafter referred to as IDS), in exchange for 130,000 shares of the Class A non-voting stock of said IDS; and

WHEREAS, on July 17, 1958, the individual defendants herein also agreed as part of the settlement of this action to pay to Alleghany Corporation the sum of $300,000 in addition to the cash and other considerations above-mentioned in the agreements dated July 25, 1955 and June 22, 1956 (said offers of July 25, 1955, June 22, 1956 and July 17, 1958 being collectively referred to hereinafter as the "Basic Settlement"); and

WHEREAS, plaintiffs herein have accepted said Basic Settlement as satisfactory to them and said objectant Rosen consents to accept this supplemental stipulation of settlement; and

WHEREAS, by opinion filed on March 12, 1959 this Court approved the aforesaid Basic Settlement embodied in the aforesaid offers of July 25, 1955, June 22, 1956 and July

17, 1958; but directed that until an order has been entered in the aforesaid Breswick action vacating the aforesaid injunctive order of October 27, 1955, no order upon said decision of this Court may be entered, except upon proof by affidavit of the happening of such event, and that then an [fol. 1365] order based upon said opinion of March 12, 1959 may be settled on notice; and

WHEREAS, by report dated November 17, 1958, a Special Master appointed by the United States District Court in the Breswick action reported to that Court recommending that by reason of the negotiations culminating in the aforesaid offers and by reason of other events since October 27, 1955 the aforesaid District Court vacate its injunctive order of October 27, 1955; and

WHEREAS, by decision and order dated September 22, 1959, at the request of plaintiffs in the aforesaid Breswick action the aforesaid District Court rejected the aforesaid report of the Special Master and remitted to him for further hearings the question of the settlement value of the whole case in this and the District Court and the relation to the value of the aforesaid additional offers of June 22, 1956 and July 17, 1958;

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned as follows:

1. Defendant Kirby will pay the sum of $1,100,000 to Alleghany Corporation on or before December 31, 1959, provided that prior to 4:00 p.m. on December 30, 1959, the orders specified in (a) and (b) below are made and that simultaneously with the payment the release specified in (c) below is given:

(a) an Order in the aforesaid Federal District Court action (*Breswick & Co. et al* v. *Briggs et al* Civil Action No. 98-371) vacating its order of October 27, 1955 therein as to defendant Kirby, so as to permit defendant Kirby to plead in bar of such action any judgment of this Court entered upon this supplemental

stipulation of settlement and/or any release authorized by judgment or order of this Court.

[fol. 1366] (b) an Order of this Court herein approving this supplemental stipulation of settlement and directing that judgment be entered herein dismissing, with prejudice, the consolidated complaint herein as against the defendant Kirby, in accordance with the terms and conditions of this supplemental stipulation of settlement.

(c) the execution and delivery by defendant Alleghany Corporation to defendant Kirby of a release in the form annexed hereto and as provided for in paragraph 7 hereof.

If the foregoing three events do not occur on or prior to the times and dates specified above, then and in that event this supplemental stipulation of settlement shall be null and void and defendant Kirby shall have no obligation to make the aforesaid payment of $1,100,000 or any other obligations hereunder.

2. Defendant Kirby hereby affirms the Basic Settlement in addition to the obligations herein assumed by him.

2a. Defendant Kirby further agrees to be and remain bound by the Basic Settlement and perform his obligations thereunder in the event the Basic Settlement is eventually consummated.

2b. Failure to consummate the Basic Settlement, however, shall not affect in any way the judgment of dismissal and release of defendant Kirby provided that defendant Kirby shall have paid the aforesaid $1,100,000 and shall in addition pay the sum of $150,000 which defendant Kirby hereby agrees to pay in the event the Basic Settlement is not consummated; said agreement to pay $150,000 additionally shall survive the execution and delivery of the release referred to in paragraph 7 and elsewhere herein.

[fol. 1367] 3. Nothing herein contained is intended to release any claims or rights of defendant Alleghany Corporation against any defendant other than defendant Kirby; any such claims and rights are hereby expressly reserved herein and the release to be given defendant Kirby as provided for herein shall contain an appropriate reservation of rights against all defendants other than defendant Kirby.

4. In the event judgment is recovered upon any cause of action or claim as to which defendant Kirby is jointly liable with one or more other defendants, the amount of the judgment on said cause of action or claim shall be reduced by the proportionate share thereof which defendant Kirby would have been required to pay had he not entered into this supplemental stipulation of settlement, and had all other defendants jointly liable for the judgment on said cause of action or claim paid their respective proportionate shares of such judgment in full; the object and intent of this provision being (a) that the defendants herein not entering into this supplemental stipulation of settlement, and whose liability upon any cause of action or claim is joint with defendant Kirby shall not by reason of this supplemental stipulation of settlement be required to pay more than the amount of such liability which they would otherwise have had to pay but for this supplemental stipulation of settlement and (b) that defendant Kirby shall not hereafter be liable to any co-defendant for contribution with respect to any cause of action or claim included in this settlement.

[fol. 1368] 5. Neither this stipulation nor any proceedings thereunder shall be construed or deemed to be evidence or an admission on the part of defendant Kirby of any liability or wrongdoing whatsoever; neither shall they constitute a general or special appearance in the above-entitled action by defendant Kirby. The further offer of settlement evidenced in this supplemental stipulation of settlement is made without prejudice, and in the event that

it is not consummated for any reason, it is understood that it shall not be offered in any proceeding, as evidence of settlement value or otherwise, for any purpose.

6. Alleghany Corporation and the undersigned agree with the defendant Kirby that the undertaking provided for in paragraphs 1 and 2 hereof shall constitute full and complete satisfaction and discharge of all claims alleged in the consolidated complaint herein as against defendant Kirby; and the undersigned agree and consent to the entry of an order (a) approving this supplemental stipulation of settlement, adjudging it fair, adequate and proper as to defendant Kirby and directing its consummation; and (b) further directing that defendant Alleghany Corporation upon payment by defendant Kirby of the sum of $1,100,000 as herein provided, shall make and deliver a general release to defendant Kirby in the form hereto annexed as Exhibit A; and (c) further directing that judgment be entered dismissing as against defendant Kirby all claims alleged in the consolidated complaint on the merits with prejudice against defendant Alleghany Corporation, its stockholders and its and their successors and assigns, but [fol. 1369] without prejudice to any rights or claims against other defendants herein.

7. Alleghany Corporation shall, upon the entry of an order of the Court herein dismissing the action herein, with prejudice, as against defendant Kirby, execute and deliver to defendant Kirby a release substantially in the form annexed hereto as Exhibit A.

8. Alleghany Corporation shall take such steps as are within its power to preserve its present voting rights in the stock of IDS and such other shares of IDS as it may hereafter acquire upon consummation of the Basic Settlement or otherwise and to exercise such voting rights as it may have and otherwise to endeavor and use its best efforts to have nominees of its selection elected as a majority of the Board of Directors of IDS, all for the purpose of Alleghany's exercising bona fide control over IDS.

9. Alleghany Corporation shall make available to counsel for the undersigned and to counsel for plaintiffs in the aforesaid Breswick action all documents in its possession or subject to its control that are relevant to the subject matter of the instant action and the said Breswick action.

10. This supplemental stipulation of settlement shall be submitted for approval to the Court herein promptly after its execution and the entry of the order referred to in paragraph 1(a) of this stipulation.

11. If the Court herein should fail or refuse to approve this supplemental stipulation of settlement on or before December 30, 1959, and to order by appropriate action the consummation thereof by such date, or if such order [fol. 1370] or judgment should be reversed on appeal, or if for any other reason it should be set aside, then and in any of these events this supplemental stipulation of settlement shall be and become null and void and of no further force and effect, and Alleghany Corporation shall promptly repay to defendant Kirby all payments theretofore made by him pursuant to this stipulation.

If the actions in the United States District Court for the Southern District of New York entitled *Breswick & Co. et al.* v. *Briggs, et al.* and *Zenn* v. *Anzalone,* and any other action presently pending involving the claims and causes of action against defendant Kirby that are alleged in the consolidated amended complaint herein, are not dismissed as to defendant Kirby upon appropriate proceedings therefor to be instituted promptly by defendant Kirby, then, upon the request of defendant Kirby, Alleghany Corporation will promptly repay to defendant Kirby all payments theretofore made by him pursuant to this stipulation, and this supplemental stipulation of settlement shall thereupon become null and void and of no further force and effect, and any order or judgment entered pursuant hereto and any order vacating the order of October 27, 1955 as to defendant Kirby only and any judgment of dismissal as to defendant Kirby only in the Breswick action shall be vacated.

12. If the Basic Settlement is abandoned or if any parties thereto are permitted to withdraw therefrom prior to the payment by defendant Kirby, pursuant to paragraph 1 [fol. 1371] hereof, then and in that event this stipulation shall be and become null and void and of no further force and effect.

Dated: December , 1959
New York, New York

Graubard & Moskovitz
Attorneys for objectant Samuel R. Rosen

Charles T. Ireland, Jr.
Attorney for defendant Alleghany Corporation

Carl E. Newton and David Teitelbaum
Attorneys-in-Fact for defendant Allan P. Kirby

[fol. 1373]

IN THE UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 30A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 98-371

BRESWICK & Co., et al.,

Plaintiffs,

vs.

O. HENRY BRIGGS, et al.,

Defendants.

Before:

HON. EDWARD J. DIMOCK,
District Judge.

New York, December 22, 1959,
4:30 P.M.

APPEARANCES:

ROSSTON, HORT & BRUSSEL, Esqs.,
Attorneys for Plaintiffs
Breswick & Co. and Myron
Neisloss;
George Brussel, Jr., Esq., of Counsel.

BATTLE, FOWLER, NEAMAN, STOKES & KHEEL, Esqs.,
Attorneys for Clarence W. Bailey;
Hyman L. Battle, Jr., Esq., of Counsel.

[fol. 1374]
SATTERLEE, WARFIELD & STEPHENS, Esqs.,
Attorneys for Defendants
Clint W. Murchison and John D.
Murchison, doing business as
Murchison Bros. and Clint W.
Murchison;
F. W. H. Adams, Esq., of Counsel.

LORD, DAY & LORD, Esqs.,
Attorneys for Estate of
Robert R. Young, et al.;
Thomas F. Daly, Esq., and
Gerard W. Glenn, Esq., of Counsel.

DONOVAN, LEISURE, NEWTON & IRVINE, Esqs.,
Attorneys for Allen P.
Kirby;
Carl E. Newton, Esq.,
David Teitelbaum, Esq., and
Robert Loeffler, Esq., of Counsel.

CHARLES T. IRELAND, Jr., Esq.,
Attorney for Alleghany
Corporation.

[fol. 1375] The Court: You may proceed, Mr. Brussel.

Mr. Brussel: May it please the Court, this is an application to your Honor to make what we consider to be an ex parte order approving a supplemental offer of settlement in the Breswick-Briggs and related cases by the defendant Allen P. Kirby. I shall try, very briefly, because of the lateness of the hour, to recapitulate the basis of this application in terms of its historical antecedents, and then, very briefly, outline, your Honor, the terms of the order and the stipulation on which it rests.

In August, 1955, in the State Court proceeding of Zenn v. Anzalone the plaintiff stockholders, through their general counsel, concluded a settlement of all of the plaintiffs' claims in that action for $700,000 in cash plus some other considerations of a non-cash nature.

On October 27, 1955, Judge Walsh, in this court and in this case, made his order barring the defendants in the State Court action from pleading in bar of this action any judgment based on that August, 1955, settlement.

In 1956, at the suggestion of Judge Walsh, the negotiations were reopened and, as a result of those negotiations, [fol. 1376] in August of that year the defendants, through their counsel in this case, offered to me on behalf of the plaintiffs an additional or augmented settlement consisting of the right to purchase shares of New York Central stock at a discount, which would have had the cash equivalent of $300,000 and the return to Alleghany Corporation of voting control of Investors Diversified Syndicate, which would be accomplished by the exchange of voting shares owned by the Murchison Group for non-voting shares of an equivalent number owned by Alleghany Corporation. That settlement was not accepted by the plaintiffs. We considered it to be inadequate.

As a result of our failure to accept it, the defendants in this case moved in this court to vacate Judge Walsh's order of October 27, 1955, and as a result of their motion Judge Walsh appointed Mr. Fitzsimmons, who, as your Honor knows is a State Court referee, to consider the

adequacy and fairness of the State Court settlement and, as Special Master here, to consider whether or not the plaintiffs' motion to vacate Judge Walsh's order should be granted.

After protracted hearings in the State Court and protracted hearings in this court, the Special Master reported [fol. 1377] in both capacities. In the State Court he said, in substance, that the offer made in the State Court as augmented by the supplementary offer of 1956 was fair and reasonable. He recommended its acceptance. In his capacity as Master, he reported to this court that by virtue of his findings in the State Court as Referee, that the defendants' motion here should be granted. That report came on before your Honor in connection with motions by both sides, by the plaintiffs to reject, and by the defendants to confirm, and your Honor rejected the Master's report and sent the proceedings back to the Master for the purpose of taking testimony as to the value of the plaintiffs' claims in order to determine whether or not any relief should be granted the defendants on their motion.

At an informal conference before the Master a few days ago, the proceedings before him were set down for February 1st, subject to the decision by your Honor on a motion pending before your Honor to substitute the executors of defendant Richardson for that deceased defendant.

About two months negotiations were opened with the representatives of defendant Kirby and they have been more or less continuously carried on since then, and very [fol. 1378] intensively carried on in the last week or ten days, practically on an around-the-clock basis for the last four days, so much so that I can say to your Honor that they were not concluded until a few minutes before the appointed hour for appearance here and the papers on the settlement were not signed until we got into this courtroom.

Now, the substance of the Kirby settlement—when I say the Kirby settlement I'm referring to the settlement by the defendant Kirby on his own, as a defendant and for

himself alone. The substance of his offer of settlement is the payment by December 31, 1959, at midnight, of $1,100,000 over and above all of the settlement considerations heretofore proffered in both cases. The settlement proposal envisages a separate release to the defendant Kirby by Alleghany Corporation, and the plaintiffs in this action, and it is based on certain conditions.

• • • • • • •

[fol. 1379] The order that your Honor is being asked to sign is presented ex parte on the theory that the parties entitled to notice, that is the plaintiffs and Mr. Kirby and Alleghany Corporation, have consented to this order, and an order with those consents will be presented to your Honor before the conclusion of this hearing.

I might say that everyone who has substantial interest in the proceedings, with the possible exception of Mr. Pomerantz, and I can't speak as to him, has had notice of the general nature of what was being done here. I don't mean to suggest to your Honor that the details of this settlement have been communicated to other counsel. They have not been, at least by me. I don't know whether they have gotten their information from other sources. I did tell Mr. Adams, in the conversation I had with him, the general nature of this settlement, and I believe that other counsel have been informed as to the general nature of this settlement, and all attend here with that much knowledge.

• • • • • • •

[fol. 1380] I may say this, too, your Honor: These negotiations with Mr. Kirby have been at arm's length. They have been in good faith. They represent what I consider to be, in my opinion, the maximum amount that we, the plaintiffs in this case, can obtain from this defendant, and I say that with due regard to all that has transpired, the whole complex of litigation, and the five years of effort that we have made to try to improve the original State Court settlement. The cash offer of Mr. Kirby increases

the original cash offer by 63 percent, in toto, and in view of what we consider to be a substantial bona fide offer, maximum obtainable, we, the plaintiffs in this case, are [fol. 1381] prepared to recommend it to the Court, although this Court isn't passing on the terms of the settlement we are prepared to recommend it to the Court as a basis for the entry of the order of vacator for which we apply.

The Court: You stated that you believe that this was an ex parte application, and properly an ex parte application, but there seems to be a connotation that perhaps someone had a different idea.

Does anyone else wish to be heard in this matter?

Mr. Adams: How about you, Mr. Teitelbaum?

Mr. Teitelbaum: On behalf of defendant Kirby, I concur in the view expressed by Mr. Brussel, the attorney for the plaintiffs, on the nature of this application as being an ex parte application, yes.

* * * * * * *

[fol. 1382] Mr. Teitelbaum: Perhaps I can clarify this by clearing up one apparent misapprehension. It was not our intent, and I don't think we conveyed to Mr. Daly intentionally that this was a settlement, a sole settlement to which Mrs. Young or the Young estate could contribute, [fol. 1383] and that it had to be done by today. What we pointed out to Mr. Daly was that the settlement which we had negotiated, we had negotiated for the account of Mr. Kirby alone, and that it did not affect the position of the other defendants with regard to this settlement or otherwise. However, in the course of our negotiations with plaintiffs' counsel we had explored, as well, the possible terms of a settlement in regard to the Young estate and in regard to the other principal defendants, and we communicated to Mr. Daly the additional consideration which it appeared would be required by the plaintiffs if we were to have a settlement which applied to all the principal defendants and, in fact, in such case to all the defendants,

it would make for a complete settlement of the suit. Therefore, we are here today before you in relation to the settlement of Mr. Kirby alone, but if this goes forward today it is not in anywise a bar to further explorations and determinations of the broader settlement which encompasses the other defendants and which can later be put into effect if the terms can be arrived at by further exploration of Mr. Daly with his clients in that connection.

Mr. Daly: Mr. Teitelbaum, may I ask you this: Whether [fol. 1384] the figure that was mentioned to me yesterday will be a firm figure in that respect?

Mr. Teitelbaum: In regard to the plaintiffs' position, sir?

Mr. Daly: In regard to the Young estate.

Mr. Teitelbaum: That is something I could not answer myself. You are really asking me whether the plaintiffs' counsel will continue as at present in that connection and—

Mr. Daly: You made a representation to me yesterday that the Young estate could buy its peace for X dollars. I want to know whether that holds good.

[fol. 1385] Obviously, at any time, your Honor, I am well aware of the fact that I can come in and settle with these plaintiffs or any plaintiff, but what I am asking for now is not to be prejudiced by a rush and to give me time to explore this offer that has been made, and give Mrs. Young time to consider it. I know quite well that I could come in a month from now and start negotiating again with these plaintiffs, but an offer has been made now and that is what I want the opportunity to explore, and I don't want to be prejudiced.

The Court: I think that is clear, and I hope that you can be given assurance on that question.

Mr. Brussel: Would your Honor bear with me just a second, please?

The Court: Yes.

(A pause.)

Mr. Brussel: I have been told, and I don't vouch for this statement, because I wasn't a party to it, that the offer that had been communicated to Mrs. Young's attorneys, through Mr. Teitelbaum and his firm, was rejected, and if that be the case, then there is nothing to say to the Court.

Mr. Teitelbaum: I don't think that is so.

[fol. 1386] Mr. Daly: I don't think that is a fair statement.

Mr. Teitelbaum: That is true. I think Mr. Brussel is mistaken in saying that I advised him that the offer was rejected. I did advise him that it had not been accepted, but it had not been firmly rejected. I think that is a fair characterization of the position, is it not, Mr. Daly?

Mr. Daly: I think that is so.

The Court: Are the plaintiffs prepared to say that the offer, whatever it was, will remain open until some date early in January which Mrs. Young asked for?

Mr. Brussel: Yes, assuming that Mrs. Young through her representatives won't attempt to interfere with the proceedings here, I am prepared to give the Court that assurance; that is, that the date of January 4, the date that Mrs. Young's attorneys mentioned, would be a reasonable date. That is, as far as we are concerned.

The Court: I don't know that you are entitled to put a condition on it. I think that that is a question of law, whether she has any right to interfere with the settlement [fol. 1387] that is going on now. I don't think that she ought to be asked to bargain that away. I am afraid it is up to me to pass on that.

Mr. Brussel: Would your Honor defer for a moment while I consult?

The Court: Yes.

(A pause.)

Mr. Brussel: We will accept your Honor's suggestion and we will keep the offer open until January 4th, and it is without any condition.

Mr. Daly: And there is no misunderstanding as to the amount of the offer that I was informed about?

Mr. Teitelbaum: Perhaps I can make this suggestion: You had it from me, Mr. Daly. Why don't you ask Mr. Brussel to speak with you for a moment and confirm what I have said.

The Court: Do you want to step out?

Mr. Teitelbaum: Yes, I would just as leave be sure that there was no misunderstanding about this.

There seems to be no misunderstanding on that score, your Honor.

Mr. Daly: There is no misunderstanding on that score, [fol. 1388] your Honor.

Mr. Adams: Judge, first let me say that I am sure your Honor will agree that these are somewhat complicated circumstances, so that at the very outset I must preserve every possible right that I have. Secondly, let me make it clear upon the record that in coming here this afternoon I do not, as your Honor understands, and I cannot appear before you in any way in behalf of the Estate of Sid Richardson. That matter is still before your Honor.

There seems to be some understanding here that if Mrs. Young didn't settle on the basis that was suggested she would have additional time to say so. That is not the case with respect to us. I stand here with a gun at my head: Settle or else. I had that both from Mr. Teitelbaum and Mr. Brussel. Now, Mr. Teitelbaum made a certain proposal to me.

The Court: "Settle today or else," is that it?

Mr. Adams: Yes.

The Court: And this is the last opportunity you will have to settle?

Mr. Adams: That is, in effect, the position I am in subject to this understanding.

[fol. 1389] Mr. Teitelbaum: That is not so, your Honor.

Mr. Brussel: Not from me, your Honor.

Mr. Newton: Not from us, your Honor.

Mr. Adams: I know what I know, Judge, and I am prepared to testify to this. However, certain proposals have been made looking toward a complete disposition of this

action in so far as my clients are concerned. It is a matter of extraordinary complication at very great length. I have had an opportunity to consider it for a very brief time. As Mr. Teitelbaum said to me over the telephone, "I can hardly ask you at five minutes to three this afternoon to come to a conclusion on a matter so important as this."

I said I had consulted with my clients and that I had considerable optimism about it. I felt that if we could put the matter over one day it would not be of any prejudice and it would enable me to conclude the discussions that I had with my clients. Moreover, it was not until I walked into the courtroom and heard Mr. Brussel that I knew what the terms of the settlement were. It is true that I was given a general understanding of some of the terms [fol. 1390] of settlement, but as to this stipulation that was commented on by Mr. Brussel, I did not know several of the things that were in there. I may say that some of them are pro and some of them are con and very much affect my judgment and my advice to my clients.

So Mr. Teitelbaum said, "All right, we will agree to put it over for one day," subject, of course, to your Honor's approval. They said they would apply to the State Court and would I agree to take short notice in the State Court, and I said, "Of course I would," because I shouldn't like to prejudice them in the State Court by asking for a delay here.

Judge, I think we are going to be able to work this out. I'm quite sure we will, but we are concerned about Mrs. Young's position. We are concerned about our position in relation to a number of extremely complicated matters. It has simply been impossible to arrange these matters in the very limited time which was available to me.

The Court: I haven't understood what you said about an adjournment until tomorrow.

Mr. Adams: I am suggesting, your Honor, that you [fol. 1391] put this whole matter over, without prejudice to anyone, until tomorrow.

The Court: I thought that you said that that had been agreed to.

Mr. Adams: I think it has.

Mr. Newton: You think it has been agreed to?

Mr. Adams: Yes.

Mr. Newton: By whom?

Mr. Adams: Mr. Teitelbaum.

Mr. Teitelbaum: May I be heard?

The Court: Yes.

Mr. Teitelbaum: First I should like to clarify another misapprehension that seems to have arisen, namely, that we are holding a gun at anyone's head. In the case of the Young Estate, we would like to see the settlement extended there, so we would be glad to see it extended to the defendants who are represented by Mr. Adams. Just as this settlement which is proposed here today on behalf of the defendant Kirby does not in any wise affect the possibility of settlement with the Young Estate, so does it not affect the possibility of a settlement with the Murchisons, who are represented by Mr. Adams. There would be no reason in the world why we should hold that kind of gun at anyone's head. We have not done so. I have had several talks with Mr. Adams yesterday and today. The most recent of [fol. 1392] those talks occurred at about 3 o'clock. At that time he suggested an extension of a day. I said I had no objection to it in principle if he would assure me and would state for the record here that the proposal which I had been discussing with him was acceptable to his clients, and if their further explorations with the Young estate did not result by tomorrow in a solution which would make it possible for the Young estate to settle as well, then he, Mr. Adams, would state for the record today that the Murchisons were prepared to settle, to agree tomorrow on the terms which we had suggested to him in the course of our discussions in the last two days.

Mr. Adams said that of course he had not seen any of the papers, and I said, "Of course you have not because they haven't been drawn. We had barely been able to put into agreed form some papers in relation to the settlement with Mr. Kirby and, of course, you are entitled to have an

opportunity to see the papers and any settlement affecting the Murchisons, in fact, you can necessarily have a part in the drafting of them. Subject to that, in principle, I think you can say that it is or is not acceptable to you."

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[fol. 1393] Mr. Adams: I don't quite understand what is bothering Mr. Teitelbaum. You see, Judge, I have told Mr. Teitlebaum—he has said, accurately, that I have told him that I felt quite sure that these arrangements would go through, but I couldn't tell him I was absolutely sure. It is just beyond my power to do it, because I couldn't get together with all the people I had to get together with, so, if it goes over until tomorrow, I certainly can't have it go over with any prejudice to me. I certainly have to be free to come in and if my clients tell me they can't go along with this, I have to tell your Honor and make any argument that is appropriate. I don't want to prejudice them. I want [fol. 1394] to fairly go forward with the settlement, but I do have to tell your Honor that as I stand here tonight I don't have the final word on it. I expect to get it, but I can't tell you tonight that I have it. I don't want to be in a position tomorrow where, if my clients for some reason say, "You can't go forward with this," I have waived all my legal rights tonight. It is just as simple as that.

Mr. Teitelbaum: Our view, sir, is that Mr. Adams' clients do not have any standing to object here as this is an ex parte application, and I would not want anything that we agreed to here today to change that position.

Mr. Adams: I would not want you to, Mr. Teitelbaum. I am not asking for any prejudice against you any more than I want prejudice against myself. It is merely a matter that we haven't been able to get this thing worked out in the time available. I feel quite sure that it can be worked out tomorrow, but I don't want to tell your Honor that I'm walking out on some agreement I made.

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[fol. 1395] The Court: If we argue it now the interests of the non-settling defendants, Mr. Teitelbaum, wouldn't run any risk of having you give him the full-fledged argument with respect to their interest tomorrow, and the only question tomorrow will be whether your clients, Mr. Adams, are agreeable to go ahead or not.

Mr. Adams: Well, if I understand your Honor, you want me to argue here now.

The Court: That was just a suggestion. I have got to decide it sometime. It will have to be argued here either tonight or tomorrow.

Mr. Adams: You wouldn't have to decide as far as the Murchisons are concerned.

The Court: A valid objection by Mrs. Young would stop the settlement just as much as a valid objection by the Murchisons.

Mr. Adams: I take it Mrs. Young, through her representative, doesn't want to make any argument on it.

Mr. Daly: Not tonight, your Honor. I have no instructions. I don't know whether Mrs. Young is going to oppose this or not.

Mr. Brussel: I never intended to consent to keeping the offer open until January 4 for any purpose other than just [fol. 1396] that, and if Mr. Daly's proposal to me meant anything more than that, then I did not intend it. I certainly didn't intend anything that I said to Mr. Daly for the benefit of his client to constitute an agreement to the non-disposition of this matter in time to consummate the settlement by the end of the year. I want to put that on the record.

Mr. Daly: Your Honor, I thought I made my position quite clear: that I had no authority to do anything at this time, and asked your Honor to put it over until January 4th.

The Court: That is why I say it seems to be up to me. I have to decide it as a matter of law.

Mr. Daly: Yes.

The Court: Whether it is argued tonight or tomorrow morning is one thing, but it is my responsibility, and I

am not going to get the consents. That is plain. I have to decide as a matter of law whether this can consummated on an ex parte application.

Mr. Daly: Yes.

Your Honor, I understand that my application is going over until January 4th. I think you said so, that [fol. 1397] everything is reserved to me. I just have no instructions today and Mrs. Young has asked me to get the postponement.

The Court: I have decided, though, in the meantime that your client has no right to object. It is just as though Mr. Brussel came into chambers without anybody, and I might have said, "This looks to me like an ex parte application. I'll sign your order." I might have been wrong, but I would like to be instructed by anybody who has anything to say on the subject as to what the rights of the parties are.

Mr. Daly: I have no right to—my instructions today are such that I have no right to say anything except—

The Court: I understand you perfectly, but I again reiterate that it puts it up to me.

Mr. Adams: I would like to, in a sense, except myself from that position, because as I told Mr. Teitelbaum—we have said to him that certain proposals which he made to me, and which I don't think we can presently put on the record—but we can, if anybody wants us to—those proposals that he made to me, I am quite sure are acceptable [fol. 1398] to my client, and I am not making any objection to anything.

The Court: There is the outside chance, as I understand it, that they would turn out not to be acceptable to your client, and then you would be free to argue against the confirmation of the settlement.

Mr. Adams: Yes. I think I will be able to tell the Court tomorrow that there is no problem. If I do have to tell you there is a problem, then I would have to argue it before your Honor tomorrow.

The Court: The only difference would be that I might

have to decide the question without benefit of any argument against the ex parte character.

Mr. Adams: You would have no opportunity—there would be no opportunity to hear Mr. Daly at all on the subject.

The Court: No.

Mr. Adams: I would think he has substantial rights. We think we have substantial rights if we don't agree to settle. I think we are going to agree to settle. That is why I said that perhaps we would put it over to tomorrow morning and during the night I could get the thing squared away, I hope. That is my intention.

. . . . . .

[fol. 1399] (A pause.)

Mr. Teitelbaum: If your Honor please.

The Court: Yes, Mr. Teitelbaum.

Mr. Teitelbaum: We have all talked this out, Mr. Adams, Mr. Daly, and my partner, Mr. Newton and myself, and we are persuaded that there appears to be a reasonable possibility that if this matter goes over until early tomorrow there may well be a broader settlement, and we would be happy to see a broader settlement if it could be achieved, and therefore, we, and the attorneys for the plain-[fol. 1400] tiffs, with whom we have also discussed the matter, are prepared to see the matter go over until tomorrow at such hour as your Honor would set, in the hope that when it comes before your Honor tomorrow all the parties will be satisfied, and there will be no occasion for being concerned about the question of consent or whether this is an ex parte order.

I may say that the plaintiffs continue to believe that this is an ex parte order which is being sought. There is one problem that I think that we do not quite see eye-to-eye on. Mr. Adams, I believe, takes the position—and he will correct me if I am wrong—that if, despite our hopes and expectations of all being in accord by tomorrow, that should not be the case, that he would then be entitled to raise with

your Honor the question of some five-day notice or extended notice before your Honor can consider the application which you have before you today. That would be probably fatal to this separate settlement for defendant Kirby in view of the very close timetable with which we are confronted, and if your Honor could rule on that question, since we do not seem to be able to agree upon it, we would be in accord on allowing the matter to go over to to-
[fol. 1401] morrow. Phrased otherwise, we are prepared to see it go over if we can have final argument on it tomorrow and put your Honor in a position to make a determination, if it has to be determined.

[fol. 1402] We would not be prepared to see it go over if it would mean five days' notice, which would take us over Christmas into next week and would make it absolutely impossible to go before the State Court and get a determination before the State Court in time to consummate this by December 30th. The terms of the offer provide that both the Federal and State Court orders shall have been entered by 4 P. M. on December 30th.

Mr. Adams: My proposal is simply that this matter go over until tomorrow without any prejudice to anybody about anything, just as though this never took place. I will not be prejudiced and they will not be prejudiced, just as though this hearing took place tomorrow instead of today.

Mr. Brussel: I understand Mr. Adams' proposal, but, unfortunately, we are being prejudiced by an adjournment. I concur completely in Mr. Teitelbaum's position. I would be prepared to consent to an adjournment if the question of five days' notice or short notice was out of the case. Otherwise, I can't take the responsibility of consenting to an adjournment.

Mr. Adams: May I say, your Honor, that this proposition of giving short notice in the State Court was never [fol. 1403] presented to me until I reached this courtroom, and I immediately said yes.

Mr. Brussel: I'm not talking about notice in the State Court.

Mr. Adams: I realize that. I think that by putting it over, if your Honor rules with me, assuming the settlement does not go through—I mean, assuming we can't work things out during the night, if your Honor rules with me their settlement can't go through anyway. If your Honor rules against me, then their settlement goes through, no matter what I say. So nobody can be hurt by having it go overnight. It is the same question tomorrow, because they certainly could get an order to show cause instead of a five-day notice. There is no problem there.

Mr. Teitelbaum: That is precisely the point, your Honor. We have an order to show cause ready to submit to your Honor, if it is necessary. If it is not necessary, we won't submit it. If it is necessary we will submit an order to show cause for your signature.

Mr. Adams: It would be presumptuous of me, Judge, to suggest to you the circumstances under which you could sign an order to show cause, and—

Mr. Teitelbaum: Can we submit the order to show cause [fol.1404] returnable tomorrow, and perhaps it may assist your Honor if we do so.

Mr. Adams: I want to make it clear, Judge, that I'm not waiving any rights of any kind. I'm merely suggesting that if your Honor says tomorrow, "Mr. Adams, you were entitled to notice," then their settlement does not go through, according to them, if your Honor rules with me. If your Honor rules against me, that is the end of it. How is anybody hurt? We don't need any orders to show cause or anything else.

The Court: The proposition is, as I understand it, to eliminate the question of notice by having to sign an order to me, because an order to show cause, which gives you one day's notice—

Mr. Adams: Yes, and I reserve all my rights with respect to that, quite naturally.

The Court: The notice does seem very short.

Mr. Teitelbaum: Well, if your Honor please, there are two answers to that. First, of course, is the fact that in our view this is an ex parte application and so no notice to these gentlemen is required. Secondly, the fact is that they have had notice, in substance, of this application for several days. I think Mr. Daly has known about it—

[fol. 1405] Mr. Newton: Since Friday.

Mr. Daly: I didn't know about anything until yesterday afternoon that this was going to come before the Court this morning.

Mr. Teitelbaum: We were substituted for Mr. Daly on Friday. At that time I think I indicated that what we had in mind was a separate application.

Mr. Daly: I think you are quite correct. There was some talk on Friday.

Mr. Adams: As far as I'm concerned—

Mr. Teitelbaum: As far as Mr. Adams is concerned, my recollection is that I talked with him as well on Friday and he told me he would oppose any application for separate settlement with Mr. Kirby. It is perhaps true that I did not at that time tell him what the terms of that settlement was going to be, but essentially the settlement is relatively simple. It would provide for the payment of a stated sum over and above that provided for in the basic settlement. It certainly does not go as to whether Mr. Adams has such notice to be given an opportunity to prepare himself to argue such questions of law and procedure as may be here involved.

* * * * * * *

[fol. 1406] The Court: My theory is that there has been a pretty practical notice of what was going on for a little longer than the one-day notice which is contemplated by the order to show cause, and I should say that it is desirable that we produce as much of an odor of sanctity as we can in the emergency, and for that reason I will be glad to examine the order to show cause and see whether I can sign it.

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[fol. 1407] The Court: Will three o'clock tomorrow afternoon be all right?

Mr. Teitelbaum: Three o'clock?

Mr. Brussel: Yes.

Mr. Teitelbaum: Could we do it at two o'clock; would that accord with your convenience, your Honor?

The Court: Not quite. Well, I could, yes.

Mr. Teitelbaum: It would help us. We have so much to do. We have to get our papers out to the State Court, and so on.

The Court: Yes.

Mr. Teitelbaum: If we have it at two o'clock—

The Court: Of course, every hour shortens this notice a little.

Mr. Adams: A quarter after two; would that be all right?

Mr. Teitelbaum: We will abide by the Judge's ruling.

[fol. 1408] The Court: 2.15 tomorrow afternoon.

(Adjourned to December 23, 1959, at 2.15 o'clock p.m.)

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[fol. 1410]

IN THE UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT No. 30B

BRESWICK & Co., et al.,

vs.

O. HENRY BRIGGS, et al.

New York, December 23, 1959;
2.20 o'clock p. m.

Hearing resumed.

Present:

Mr. Brussel,
Graubard,
Mr. Battle,
Mr. King,
Mr. Adams,
Mr. Daly,
Mr. Glenn,
Mr. Newton,
Mr. Teitelbaum,
Mr. Ireland,
Mr. Phillips.

Mr. Adams: May it please the Court—

Mr. Teitelbaum: If your Honor please, I believe this is our application.

Mr. Adams: Well, it was left yesterday afternoon, may it please the Court, that we would have an opportunity to consult and take such steps as might be necessary and come back here today, and I am prepared to go forward.

[fol. 1411] At six o'clock last night, your Honor signed an order to show cause giving me some 20 hours notice, and I have an application to make before any application is made under that order to show cause. I think I am entitled to make that first.

The Court: All right, proceed.

Mr. Adams: Now, may it please the Court, the posture of this case at this moment is that your Honor has considered the report of a Special Master who was appointed by your Honor, by your Honor's predecessor, to consider and to recommend to your Honor, or to report to your Honor on the question of whether the injunction of Judge Walsh of October 27, 1955, should be lifted.

The Referee did report—the Special Master did report recommending that that be done.

Then your Honor, having considered that report, returned the matter to the Special Master to ask the Special Master to consider whatever further evidence the plaintiffs

wanted to introduce on the question of whether the proposed offers in settlement were adequate in relation to the total value of the claims in the case.

[fol. 1412] On December 16, a meeting was called by the Special Master—I may say in parenthesis here that in the interval, on October 1, my client, Mr. Sid Richardson, died, and eventually a motion was made to substitute his executor. That motion is presently pending before your Honor, and it was argued, as I recall it, on December 14.

Notwithstanding that, a conference was called by the Special Master, quite promptly, to arrange for going forward with additional hearings before him.

At that time a date of February 1, the week of February 1, was fixed for the resumption of those hearings before the Special Master.

At that very time Mr. Brussel was in secret, private, clandestine negotiation with Kirby. Not one word was said to the Master about that, not one word was said to me or to any of my clients.

In fact, Mr. Brussel said on that record, "I insist upon calling Kirby." Here is a man he has almost reached a settlement with.

On December 18, two days later, I learned by accident—and my clients learned—that Mr. Daly's firm was being replaced by the Donovan firm.

[fol. 1413] I learned this late in the afternoon, Friday the 18th.

I immediately telephoned Mr. Newton and said that I had a rumor that they had been substituted and that a settlement, a private settlement had been negotiated.

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I said that I had wanted him to understand that we intended to protect all of our rights in relation to any private settlement.

Mr. Newton said he knew nothing about any private settlement, and couldn't know what the terms were because he had only been substituted within half an hour, and that he had not negotiated any such settlement.

On Monday morning, December 21, since Mr. Brussel had called me at about 6 o'clock on the evening of the 18th, some- [fol. 1414] time around 10.30 or so on Monday morning I called him back.

He said at that time that a private settlement had been negotiated with Kirby, but that he had heard that I objected—not that I objected, but he had heard that I was opposed to anything done in my absence, and that I was—I will take Mr. Brussel's word here because I don't remember the exact words—but I think he said that I was directed to appear before you yesterday afternoon at 4.30.

I have searched my memory, I may be wrong, he may have said "invited."

* * * * * * *

[fol. 1415] Now, during the day, your Honor, I became more and more concerned about this secret clandestine settlement about which I could not get the terms, and I told Mr. Teitelbaum, and I left word at Mr. Brussel's office, because he was out—I have no way of knowing whether he ever received this word, but I talked directly to Mr. Teitelbaum, and I told him, because of the enormous importance of the matters involved and because of the inability, my inability to consult with my clients, all of whom are in Texas, that I would have to insist upon full notice under the rules so that I could have a chance to consult with my clients, which, your Honor, to this very moment I have not had, not to this moment.

Now, notwithstanding all this, I was never advised of the terms of the settlement until after the argument before your Honor yesterday. During the course of the argument Mr. Brussel—and, your Honor, I hope, will examine the transcript in this respect—made certain limited observations concerning the terms of the Kirby settlement. Although the papers were here in court, although I had previously asked that the papers be submitted to me so that I could consider the matter, I never received the proposed [fol. 1416] stipulation until after the hearing before your Honor.

Now, during the course, your Honor, of December 21st to December 22nd, Mr. Teitelbaum made certain proposals to me looking toward a disposition of the Murchison situation in this case. I told him that to the extent that I could, I would consider the proposals, and we discussed them back and forth by telephone. I invited him to my office to meet to discuss the proposals, but he was so busy that he could not come there.

Now, your Honor, here comes the critical aspect of the situation to which I direct myself:

Let me withdraw that and put it in these words:

Yesterday I came into this courtroom, having negotiated with Mr. Teitelbaum in good faith concerning certain proposals, and I told your Honor that on the basis of what I had understood of the proposals made and that even at 2:55 in the afternoon Mr. Teitelbaum had admitted that I did not have the full story before me and could not make a decision, but I said, "On the basis of what I understand the proposals to be, I think we can work something out.", and I told your Honor that in good faith.

[fol. 1417] Judge, I have been 30 years at the bar, and I have never had anything happen like this happened to me before. Judge, I have been asked to negotiate concerning certain proposals. When I got this stipulation, which I was supposed to sign, in substance, when I looked at it I found that in many vital respects I had been completely misled, vital matters which Mr. Teitelbaum and everybody knows in this case my clients could never agree to, had never been put before me, and I was led to come into this court and tell your Honor in good faith that I thought something could be settled, when they had withheld—withheld from me the very basis of the settlement upon which they knew I could not settle; they knew I could not settle.

Now, Judge, I did what I did yesterday in this courtroom in perfectly good faith, and I did not know that I was being completely misled about the basis of the proposals made, and that vital terms had been omitted, and I want to tell your Honor that when I look at this stipula-

tion, I find—and this is not only Kirby's settlement but the settlement I was supposed to agree to in part—that except for the payment of $1,100,000, nobody gave me any information concerning paragraphs 2C, 3, 4, 5, 6, 7, 8, 9, 11 and 12.

[fol. 1418] Immediately after the proceedings yesterday, I advised counsel—and I may say in no uncertain terms—that I would not and could not accept such a stipulation or such a settlement, either on one which this court would permit as far as Kirby was concerned, or the proposals which had been made to me.

Judge, you know, I feel very uncomfortable in this courtroom today, and I feel very unhappy, because the very conduct, exactly the same thing which caused Judge Walsh to issue the original injunction, in which neither I nor my firm had any part whatever, has been practiced upon me by Mr. Brussel and Mr. Teitelbaum and Mr. Kirby. Secret, private negotiations, looking toward the settlement of an enormously important and complex litigation, have gone on without one word to me.

In this courtrom yesterday, Mr. Brussel said, "We have been in continuous negotiation for two months, intensively for the last week, and for the last four days on a round-the-clock basis"—privately, secretly, surreptitiously, without disclosing one single word to me or to my clients, until, at the earliest—

The Court: You can help me a lot if you will just give me a word or two on why, for one defendant, it is so important to know of negotiations between the plaintiff and [fol. 1419] another defendant.

Mr. Adams: I am coming to that, your Honor.

The Court: It seems to me your motion is entirely different from the position which actuated Judge Walsh's action, when the settlement was worked out by one plaintiff without the knowledge of the other plaintiff, another plaintiff.

Mr. Adams: That is true here. That is certainly true here.

I may say this, your Honor, that I am shocked to find that Mr. Pomerantz is not in this courtroom, and so far as I am informed, he has had no notice of these proceedings whatever.

Now, Mr. Pomerantz's business is his own, but here we are, defendants who are being put at the mercy of a private settlement in a stockholders' action, which requires notice to all stockholders, not only in the Supreme Court, but in this court, that a secret settlement is arrived at.

I certainly am prejudiced. I have to be prejudiced. The very least that could have been done would have been to do the thing that Judge Walsh said should have been done before, to call Mr. Pomerantz in, but when the shoe is on the other foot, that isn't done.

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[fol. 1420] The Court: It is really very hard for me to carry all this in my mind as you give it to me without knowing what direction you are going in. It would be so much easier if I knew why you thought that this settlement could prejudice your clients. Then I could build on that.

Mr. Adams: Let me come to that, your Honor. The original offers of settlement, as augmented or changed, provided—first they were joint offers of settlement, a combined offer of settlement by all parties.

I represent to the Court that we would never have made the offers of settlement if we had anticipated that one of the defendants was going to be left out and that he would not be on the firing line with us. We would never have made the offers.

Secondly, the stipulation of Mr. Kirby, which he has signed, and which your Honor, has been signed by Alleghany Corporation, signed by the corporation, no submission to the stockholders.

[fol. 1421] That stipulation of settlement provides, and I read to your Honor paragraph 8, or direct your Honor's attention to paragraph 8—first let me put it this way: Our offer of settlement provided that we would return to Alleghany 130,000 shares of the voting stock of IDS, a publicly held investment company.

There were no strings of any kind attached to that offer. There were no conditions as to how Alleghany would deal with that stock or could be required to deal with it.

In the negotiations, as your Honor may recall, that very thing was proposed and was rejected by us.

[fol. 1422] We said, "We will turn the stock over which is asked for in the complaint. We will take back 130,000 shares of non-voting stock," and that is the situation. But what has Alleghany Corporation bound itself to do by this stipulation? This stipulation, made by Alleghany Corporation, with no evidence that its board of directors ever acted on the stipulation, signed by an attorney in fact, signed by an attorney for the corporation, passed on, I believe, your Honor, but I cannot prove, by the very executive committee of which Mr. Kirby is a member, and what does it do? This stipulation, Judge, irrevocably binds Alleghany Corporation—of which I may say we own a few shares, and I am entitled to be here as a stockholder as well—to preserve its voting rights in the stock and such other shares as it may hereafter acquire, and that is the 130,000 shares, and to exercise such voting rights and so on, so that it will forever control IDS.

Now, what this has done to us, Judge, is that we are going to get 130,000 non-voting shares back, non-voting shares. At the present market they are worth about $60,000,000. That means that Alleghany, whatever may happen to it, bankruptcy, anything else in this world, no [fol. 1423] matter who may control it, no matter what scoundrels may get in charge of it, we may never have any voice, and neither can any of the other 4500 shareholders of IDS.

Now, you asked me how I am prejudiced, Judge. I am prejudiced because a private agreement has been made by Alleghany with the chairman of its board, the chairman of its own board, Judge, which finally, permanently determines the minority rights of my clients in IDS. That is how I am prejudiced. That is one way I am prejudiced.

Now I called to your Honor's attention that the Special Master in his report to you pointed out that he did not believe that a court of equity in a trial of this action should impose nor is there any reason for imposing any such drastic conditions in connection with the IDS transaction. In this connection it may be pointed out the IDS, which is a publicly-owned corporation, is not before the Court and no action should now be taken which would limit or abridge the right of its stockholders to act in the best interests of the corporation.

But that is what has been done here by a private agree-
[fol. 1424] ment of which we have not one word to say with $60,000,000 at stake.

Judge, we would never have entered into the original stipulation of settlement; we would never have made the offer of returning IDS, our shares, if we knew that the power of IDS to act with reference to those shares was going to be permanently alienated. That is how I am prejudiced.

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[fol. 1425] In the following paragraph, paragraph 9, Mr. Kirby, the chairman of the board of Alleghany, a principal stockholder, has turned state's evidence and has agreed and Alleghany has agreed to make available to counsel, to Mr. Brussel, all documents in his possession or subject to his control that are relevant to the subject matter of the instant action and the said Breswick action.

Do the Murchisons have the benefit of that agreement by Alleghany? Is it fair, Judge, that the chairman of this board and this company should make a private, secret agreement culminating in this? Is this not prejudicial to me?

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[fol. 1426] Now, Alleghany's problems are not mine, Judge, but I must say that as a citizen I am shocked by the idea that this lawyer, who has added up 80 or 90 million dollars of liabilities for Mr. Kirby would agree to a

settlement of $1,100,000, and 50 or 60 million dollars of that liability does not involve the Murchisons at all, and say that Alleghany, if a judgment is entered against some of the defendants for this sum of money, will never collect another nickel from Kirby.

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[fol. 1427] But, your Honor, let me give you another suggestion here.

My friends will suggest to your Honor, "Oh, but there is nothing before you, Judge, except just a simple application to vacate part of the injunction." But if your Honor will analyze the papers, as I have in the limited time available to me, you will find, if I may use the slang expression, Judge, that that is as phony as a three-dollar bill.

Now, what your Honor is actually being asked to do here, without any compliance of any kind with Rule 23(c) of the Federal Rules, which requires notice in class actions—what your Honor is being asked to do is to pass on the fairness and adequacy of the settlement of a stockholders suit involving vital rights of defendants.

I quote from yesterday's transcript:

> "Mr. Brussel: May it please the Court, this is an application to your Honor to make what we consider to be an ex parte order approving a supplemental offer of settlement in the Breswick-Briggs and re-related cases by the defendant Allen P. Kirby."

[fol. 1428] They say they are asking your Honor to pass upon a supplemental offer of settlement. They even wanted to have it passed on as an ex parte matter.

They will say, "Oh, well, really, Judge, all we are doing is asking you to let us go across the street and argue this." They say this is just merely a matter that will take just one hearing, that you perform merely a ministerial act in effect of momentarily lifting this injunction so that this defendant may go across the street.

But if you analyze the papers and if you look at the stipulation which you are asked to pass upon, the commit-

ment is and the inevitable effect of the order your Honor is asked to sign is that your Honor is asked to approve, as Mr. Brussel, with unwitting candor stated, a supplemental offer of settlement by one defendant.

I suggest to your Honor that this is in complete violation not only of Rule 23(c) but the other rules of this court and the cases in this circuit.

This may not be done in this manner. This is actually, [fol. 1429] Judge, a scheme; this is a scheme to get a dismissal of this case in this court as to Mr. Kirby without this Court ever having an opportunity to pass on it other than in an ex parte fashion, and without our clients or the thousands of stockholders of Alleghany or anybody else ever being let in on these proceedings.

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[fol. 1430] The Court: Mr. Teitelbaum.

Mr. Teitelbaum: May it please the Court, I have listened here for the last hour and a quarter with a sense of outrage and amazement to many of the things that Mr. Adams has seen fit to say. I do not propose to take the time of this Court for an hour and a quarter to try to correct the record in every regard in which it should be corrected if one were to try to make it completely accurate.

I am well aware that Mr. Adams' primary objective here today is delay, delay and more delay, and I am very much afraid that if I were to indulge my, I think normal, desire to speak to every one of the things he has said, we [fol. 1431] should tax your Honor's patience, and time should waste away on matters that perhaps are more a matter of personal privilege than they are a matter of issue in this court.

However, since this is a public hearing, and since many of the things have been said here publicly in the presence of the press as well as of all those present, and since I think it is important that the record should be clear in major outline, at least, I would crave your indulgence for five or ten minutes to talk about some of these things that

Mr. Adams has said, has implied by the very eloquent power of innuendo and direct statement of which he is capable.

I want to say first that my first connection with this case occurred in the middle of last week. I was busily engaged on a closing. I just heard something about the fact that there had been some inquiries as to whether we would be in a position to act in the matter.

My closing closed on Friday morning. I paid not the slightest attention to this until Friday afternoon. Therefore, my connection with this case dates from Friday afternoon of this past week.

Secondly, I want to go back here for a moment to what [fol. 1432] was said about the suddenness, the privateness, the secrecy, the clandestine nature of this settlement that Mr. Kirby is said to have made.

I am informed that at least three weeks ago there was a meeting—

Mr. Newton: Four.

Mr. Teitelbaum: —at which Mr. Kirby spoke to counsel for himself at that time and for the Young Estate—I refer to Lord, Day & Lord, of course—and said to them, "I am thinking of making a settlement along these lines. I wish you would speak to Mrs. Young about it, and I wish you would get in touch with the Texans through their counsel and find out whether they would be interested in making a settlement along similar lines."

In due course I am informed that counsel for Mr. Kirby at the time, Lord, Day & Lord, reported to him that they had made these inquiries, that they were informed that Mrs. Young was not interested and that they were informed that the Texans' point of view was that nothing should be said on their behalf in regard to any settlement at this time.

[fol. 1433] The fact, therefore, is not that Mr. Kirby has made here a private, clandestine settlement. The fact is that he has given his co-defendants, or at least—yes, his co-defendants an opportunity to participate on the same

terms, that they have known this four weeks, that they have chosen not to participate, and that they have also known that absent their participation Mr. Kirby was going to go ahead and make such a separate settlement.

And I must emphasize, if your Honor please, it is a separate settlement to which all these adjectives do not apply.

How can you have a private settlement? We are here before your Honor today in court. We get your Honor to lift this injunction. We go to the State Court and we go to the State Court on notice of settlement as required by Judge McGivern, to all parties involved, and we have a full address hearing before Judge McGivern, at which Mr. Adams and the other counsel present, as well as all those who are not present, will have a full opportunity to say their say. There is nothing private about this. There is nothing clandestine about this, and there is nothing insiduous about it as Mr. Adams would have you believe. [fol. 1434] Now, I would like to say a word about my talks with Mr. Adams. The first talk I had with him—and he is correct in that—I first thought yesterday that it was Friday afternoon. It was not. It was Monday morning. He called me up and he said, "I hear you are going to go up to Judge Dimock and have a hearing."

I said, "Yes, we are."

"Well," he said, "I'm opposed to this, you know."

I said, "Well, you're welcome to come up and say your piece."

That's about where we left it, except that he said, "Well, what is this settlement about?" and as he correctly told you, I told him it was $1,100,000 by Mr. Kirby in addition to confirming his undertakings in the basic settlement that had been worked out in the State Court several years ago and the operation of which has been suspended by virtue of the fact that your Honor, or rather your predecessor in this case, Judge Walsh, has entered an order, that the settlement be not consummated, and that is where the matter stands.

He said to me, "Were there any other provisions?"

I said, "Well, of course, we have a stipulation. There will be lots of other provisions in it, no doubt. As a matter of fact, we haven't yet drafted the stipulation.

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[fol. 1435] Mr. Teitelbaum: * * * Now, so much, sir, for matters of personal privilege. I would like to get down to the meat of this cocoanut.

The Court: Yes. I have got too, in the short time allotted to me, find out whether the other defendants really have any interest in the settlement. We started out by Mr. Brussel saying that this was an ex parte order, with an intonation in his voice that that was going to be the issue, and that is the issue, whether this can be dealt with on an ex parte basis or whether other people have notice.

Mr. Teitelbaum: If your Honor please, we still think it is an ex parte matter. We do not think it affects the [fol. 1436] other defendants one iota. We have not opposed your hearing from Mr. Adams and from anyone else because we did not wish it to be thought or said that we were trying to preclude your Honor from hearing everything that had to be said, notwithstanding which we have had that charge made against us. But all we are seeking to do here is to obtain from your Honor an order saying that a settlement made proceed in the State Court and that if a settlement in the State Court is brought to fruition it may be pleaded here in bar of the action before this court as a matter of res judicata.

Now, such an application is necessary because when Judge McGivern, in the State Court, in March of this year, confirmed the original settlement he stated in his decision that in view of the pending order in this court, this injunctive order to which our application is addressed, in view of that injunctive order he did not think it would be appropriate for him to enter a final order approving the basic settlement unless and until he were presented with an affidavit showing that the injunction had been lifted and his direction in his decision was that such an affidavit, with a

proposed order approving the settlement, be submitted on [fol. 1437] two days' settlement of notice.

And what we have been trying to do here, your Honor, is to persuade you that it is appropriate on the basis of the additional payment of $1,100,000 which Mr. Kirby is prepared to make, that the settlement in the State Court, with that supplement, go forward as regards the defendant Kirby, and time is of the essence—tomorrow or Friday, I should say, is Christmas, and if we are to do this by the end of the year we will have to serve our notice of settlement to order by Thursday, to make it returnable by Monday, and Thursday is tomorrow, of course.

We feel, of course, that we ought to permit Judge McGivern to have at least a couple of days to consider the matter if need be, and we do not wish to crowd it beyond that since the terms of the settlement are there to be pressed upon as well.

The Court: You say that this application differs from the previous application which was submitted to the Special Master in that that application was with respect to somebody else's settlement whereas this settlement is one which has been approved by the plaintiff in this court. Is there any other difference between the two cases?

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[fol. 1438] Mr. Teitelbaum: I think it might be more appropriate to do so. From my point of view the essential difference is that now, in return for the release of one of all these defendants, there is a proposed payment of $1,100,000 which is more, standing by itself, than the whole million dollar consideration in the original settlement.

The Court: Yes, a better settlement.

Mr. Teitelbaum: A much better settlement. Now, on the technical side, I would defer to what counsel for the plaintiffs can tell you.

The Court: That means, of course, that I would be the one who was deciding whether or not it was a better settlement, and 24 hours is pretty hard time to decide whether it is adequate or not.

Mr. Teitelbaum: In our view of the matter it is not necessary for your Honor to decide that question at all.

The Court: I think you had better leave this for Mr. Brussel.

Mr. Teitelbaum: All right. Very good, sir.

Now, I would like, your Honor, to go through this stipulation very briefly so that we can understand once and for [fol. 1439] all what it does contain, instead of talking in vague generalities, with suggestions that it contains horrendous things.

Now, paragraph 1 of the stipulation says that defendant Kirby will pay the sum of $1,100,000 to Alleghany Corporation on or before December 31, 1959, provided that by 4 P.M. on December 30, 1959, there are entered an order in this case vacating the earlier order of injunction so far as the defendant Kirby is concerned and that there is entered an order in the State Court proceeding approving this stipulation of settlement and directing that judgment be entered, etc., and that there be a release given to Kirby upon his payment of the $1,100,000.

It is provided that if these three events do not occur, then a stipulation of settlement becomes null and void, Kirby remains a party, he does not pay this $1,100,000, and all bets are off.

Paragraph 2 says that the defendant Kirby affirms hereby the basic settlement in addition to the obligations which he assumes in this further stipulation.

Paragraph 2(a) says that defendant Kirby agrees to remain bound by the basic settlement agreement and to perform his obligations thereunder in the event the basic [fol. 1440] settlement is eventually consummated—all perfectly obvious.

Paragraph 2(b) says that if Kirby pays his $1,100,000, and then the basic settlement should later be abandoned for some reason—and I am much interested to note that Mr. Adams, among other things, is here suggesting that the basic settlement be abandoned by virtue of his withdrawal from it—if it would be abandoned, it is provided

that Mr. Kirby would pay an additional $150,000 in addition to his $1,100,000.

Paragraph 3 says that nothing in this stipulation is intended to release the claims or rights of defendant Alleghany Corporation against any defendant other than Kirby. Such rights are then expressly reserved.

Paragraph 4 says that if judgment is recovered on any cause of action as to which the defendant Kirby would be liable, the amount of the judgment shall be reduced proportionately, and this is the clause upon which Mr. Adams spent so much time suggesting that it would prejudice him. [fol. 1441] I am not going to labor the point. I think your Honor correctly analyzed the matter when he pointed out that whether one of the other defendants becomes insolvent or not, the measure of contribution will not change.

The Court: That is merely my impression.

Mr. Teitelbaum: Well, we believe that to be the law, and that is certainly the basis upon which we have drawn this.

The Court: And what do you say on this point that they may be liable in different priorities?

Mr. Teitelbaum: I say that is far from what I know, and I say it with some retiscence, because I have not been in the case very long.

I say from what I know the Murchisons whom he represents are at least primarily defendants, as Mr. Kirby is, and therefore it is most unlikely that there would be any such finding of primary liability on the part of Kirby and secondarily on the part of the Murchisons.

The Court: That "unlikely" is not enough. I think if there is a question there, they ought to be allowed to argue it.

Mr. Teitelbaum: I must confess not being prepared at [fol. 1442] this moment to address myself to that question, your Honor.

The Court: It seems to be of importance.

Mr. Teitelbaum: Then I would be glad to explore it further, sir.

Now, paragraph 5 says that neither this stipulation nor any proceedings under it shall be construed or deemed to be evidence or an admission on the part of the defendant Kirby of any liability or wrongdoing, and this comes out of the basic stipulation, so it could hardly have been a surprise to Mr. Adams.

Neither shall they constitute a special or general appearance on the part of Kirby the fact that Mr. Kirby has never appeared in the other action formally.

Then, paragraph 6 provides that what Kirby agrees to pay and undertakes to pay shall be a complete discharge of the claims alleged against him, and the parties to the stipulation agree and consent to the entry of an order approving such stipulation of settlement, declaring it to be fair and adequate, and directing that upon payment of the $1,100,000 a general release be executed.

That is all machinery, if your Honor please, to effectuate the terms of this settlement.

[fol. 1443] Paragraph 7 is much the same thing: Machinery.

Paragraph 8 is really the nubbin of the whole matter. It is paragraph 8 which so upset Mr. Adams last night, that while two hours earlier or an hour earlier he had indicated to your Honor in this courtroom that his people were prepared to go along, he thought, and just wanted 24 hours in which to try to work something out with other defendants, today he is here bitterly opposing this settlement.

This clause simply says that Alleghany shall such steps as are within its power to preserve its present voting rights in the stock of IDS and such other shares of IDS as it may hereinafter acquire on the consummation of the basic settlement or otherwise, that it will exercise such voting rights as it may have and otherwise use its best efforts to have nominees of its selection elected to the board of directors of IDS, all for the exercise of Alleghany's bona fide control over IDS.

This clause was put into this stipulation at the strong insistence of the plaintiffs in this action. It does not mean

what Mr. Adams apparently thinks it means. I have talked [fol. 1444] with him about it, and he says it is not clear to him. He thinks it means that this is frozen forever, and that in some way this is in derogation of his clients' rights.

I listened very intently to the way in which this was in derogation of his clients' rights, and I must confess I did not understand what he was saying.

However, in order that there be no question as to the meaning and intendment of this paragraph, and in view of the question which Mr. Adams raised in our discussion last evening about it, I would like at this time, speaking for all parties to the stipulation, to state what the agreed interpretation and meaning is.

The clause is not intended to bind Alleghany in perpetuity. It does not and is not intended to bar Alleghany from disposing of all or part of its holdings of IDS stock in the event that in the bona fide judgment of its board of directors such disposition thereof should be in the best interests of Alleghany and its stockholders.

The obligations of Alleghany Corporation expressed in paragraph 8 are required to be performed if and only so long as they are consonant with the best interests of Alle- [fol. 1445] ghany Corporation and its stockholders.

In passing upon what is in the best interests of Alleghany and its stockholders, it is anticipated, of course, that the directors of Alleghany will take into account the substantial value of the voting control of IDS as well as all other relevant considerations.

In short, it is the intendment of the clause in question to do no more than to declare what is really the right and duty of Alleghany Corporation as a matter of law with respect to its present and future holdings of IDS stock.

That, sir, I am authorized to say, is the interpretation and meaning put upon this paragraph by all the parties to this stipulation.

Now, I don't know that this makes Mr. Adams happy. In fact, I am sure it does not. But it does not mean that there is anything wrong or shocking about the clause, as

he suggested. Indeed, it is merely a declaration of what Alleghany Corporation and its board of directors are obliged to do under well-recognized principles of law.

The Court: Does it constitute a determination of what the law is under those circumstances for the purposes of [fol. 1446] this particular acquisition?

Mr. Teitelbaum: It is not intended so to do.

The Court: Having made that public declaration, why couldn't it be eliminated?

Mr. Teitelbaum: Speaking for the defendant Kirby, we have no objection to its elimination. I cannot speak in that connection for the plaintiffs.

The Court: Do the plaintiffs care about it?

Mr. Brussel: Will your Honor permit me to reserve until a little later in the proceedings?

The Court: Yes.

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[fol. 1447] The Court: Am I not right in thinking that the State Court proceeding cannot be settled without notice to Mr. Pomerantz?

Mr. Brussel: You are quite correct.

The Court: That is all there is to say about it. He is not a party here.

Mr. Brussel: That is right, and I might add that nothing in Mr. Pomerantz' activities, either here or in the State Court, suggest to me that I should repose any trust in his actions—

The Court: He is in the State Court, and he is bound to be consulted. That is all.

Mr. Brussel: All right.

Now, it is argued that the defendants would not have entered into this New York State Court stipulation if they had known that Mr. Kirby was going to try to crawl out separately. Frankly, the plaintiffs don't care what the [fol. 1448] defendants would or would not have done. If they have any grievance against the defendant Kirby for his conduct here, they can assert it in a separate lawsuit or in another forum or any of the forums that have been

selected for the litigation of these cases. We are not concerned with that. Our duty is to procure for the Alleghany Corporation in this court the highest sum we can from this defendant, and that we have diligently done, and I haven't the slightest doubt in my own mind that I can in good faith and complete candor recommend it to the Court, not for the purpose of having your Honor approve it as to amount but for the purpose of explaining and justifying the application which we are making for the lifting of this injunction to the extent of permitting Mr. Kirby to go forward in the State Court.

That is the sole reason that this is before your Honor, and I think that our activities and our conduct in this case are self-explanatory, because your Honor has been thoroughly conversant with the course of this litigation.

I think that concludes my statement, your Honor.

I have been asked and have agreed to spread this state-
[fol. 1449] ment on the record, that the plaintiffs herein and Alleghany Corporation stipulate on the record with the defendant Allen P. Kirby that in the event the State Court in the then action—that is the then New York action—approve the supplemental stipulation of settlement with Allen P. Kirby, then, after dismissal of the State Court action as to the defendant Allen P. Kirby, the plaintiffs will consent in this court to the dismissal of the defendant Kirby in this action, that is, the action of Breswick Company against Briggs, with prejudice, assuming and upon an appropriate application by the defendant Kirby for such relief.

The Court: Mr. Brussel, I don't know exactly what the obligation of the Court would be in that respect, but of course that stipulation by the parties does bind the Court.

Mr. Brussel: I am well aware of that, your Honor.

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[fol. 1450] Mr. Brussel: Yes, I think your Honor should say that because the purpose of Judge Walsh's injunction was to permit us to negotiate in good faith with defendants, and we are coming here and representing that we have

negotiated in good faith and reporting to your Honor that we have accomplished the purpose of the injunction as to defendant Kirby. That is the reason that I think your Honor should act and vacate this injunction as to him. We are at long last able to say that as to this one defendant we have gotten what we think is the maximum obtainable on the best possible terms, and in view of that we are prepared to take our chances in the State Court.

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[fol. 1451] The Court: Questions have been raised as to the effect of this release of the defendant Kirby from the liability for contribution. If there is nothing to this except an agreement by the plaintiff that the plaintiff will not enforce Kirby's share of the judgment, and you are satisfied that the legal effect of that is that there can be no contribution against him, then I don't have this difficult question which I was putting up to you and to Mr. Brussel as to just how the corporation's relieving the defendants of Kirby's share of the judgment would work. I'll tell you now that there are only two things in this agreement which I can see have any tendency to affect any of the other defendants, and that is part of paragraph 4 and paragraph 8, and if you will strike out that part of paragraph 4 and pragraph 8 I will hold that no other person has any interest here than the Alleghany Corporation and Kirby.

[fol. 1452] Mr. Teitelbaum: May I call this to your Honor's attention in this connection: While subparagraph (b) says that Kirby shall not hereafter be liable to any co-defendant for contribution with respect to any cause of action included in this settlement, any possible prejudice to the other co-defendants as a result of their being deprived of any such right of contribution which they may have—and I question very seriously that they do have any, but if they did have any right of contribution, then the earlier portion of this same clause will protect them against loss in that respect, except for these rather involved questions that have been the subject of some colloquy between us and between Mr. Adams.

Mr. Graubard: May I be heard, since this is the State Court stipulation that I drafted to the best of my ability and based upon what I thought was the law as best as I know it in this court as well as in the State Courts.

The operative portion of this paragraph is expressed in the first half. All that the clause (a) and (b) that follow express are an intention. If the operative clause should remain in ambiguity then it is the (a) and (b) that would [fol. 1453] apply and only then. I feel, sir, that in drafting this I did my best under rather difficult circumstances to protect both parties. We didn't want to overreach, and I think that the proper interpretation of this would be the operative clause is the one that binds and it is up to the Court to express the intention in case of ambiguity only. That means that (a) and (b) rather balance each other, and I think that there can be no injury to the other defendants under these circumstances.

The Court: So you would leave them in?

Mr. Graubard: I would state, your Honor, that since I put that clause (b) in as a matter of equity to what the other party with whom I was negotiating, rather than to defend Alleghany Corporation, I would have no objection to having clause (b) go out.

The Court: Then what about clause (a)?

Mr. Graubard: Is your Honor also considering clause (a)?

The Court: I was going to suggest that you leave out all interpretation of the thing and let it stand.

Mr. Graubard: I have no objection, your Honor.

The Court: What's that?

Mr. Graubard: I have no objection.

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[fol. 1454] The Court: All right.

Has the plaintiff made any progress with respect to paragraph 8?

Mr. Brussel: Yes. I am prepared to say to your Honor that on the basis of your Honor's suggestion and in view of the state of the record, the plaintiffs are all agreed that

that section can be withdrawn, and we understand counsel on the other side are agreeable to eliminating paragraph 8.

Mr. Teitelbaum: Defendant Kirby is agreeable to that, and I understand that Alleghany Corporation is agreeable to that.

Mr. Ireland: Alleghany Corporation is agreeable, your Honor.

The Court: Has there been any further discussion with Mr. Adams about giving him further time to discuss this?

Mr. Teitelbaum: There has not, sir. We have been busily engaged in trying to decide whether it would be all right for us to make this deletion from paragraph 4.

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[fol. 1455] The Court: I am disposed to give Mr. Adams until tomorrow morning to communicate with his clients, but my direction is that in the absence of something extraordinary which you would bring up tomorrow, I will sign the order and approve the stipulation with the dele-

[fol. 1456] tions which we have agreed upon.

Mr. Adams: Thank you very much, Judge.

The Court: What time would you like to be here in the morning?

Mr. Adams: At your convenience, Judge.

Mr. Teitelbaum: 10 o'clock?

The Court: How much time do you want?

Mr. Adams: I would much prefer if you could make it 11 o'clock, because of the time differential between New York and Texas.

The Court: That hour will make it more difficult to get these things out in the afternoon.

Mr. Adams: I agree with that, Judge.

The Court: Let us make it half-past ten, and I should think Mr. Adams' suggestion of having the papers all ready in the form that I have referred to will make things easier, because the chances are nine out of ten that I will sign this.

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[fol. 1458]

IN THE UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT No. 30C

Civ. 98-371

BRESWICK & Co., *et al.*,

vs.

O. HENRY BRIGGS, *et al.*

New York, December 24, 1959,
10:30 A.M.

Present:

Mr. Brussel,
Mr. Graubard,
Mr. Battle,
Mr. King,
Mr. Teitelbaum,
Mr. Ireland,
Mr. Phillips,
Mr. Adams,
Mr. Daly,
Mr. Stockhausen.

Also Present:

Alexander Kahn, Esq., and
Harry Bijur, Esq.,
Attorneys for Adelaide Neuwirth.

Mr. Stockhausen: Your Honor, my partner, Mr. Adams is on the phone trying to reach Dallas and one particular

person down there regarding certain tax problems that we have, and he is on the phone now with them, and I hope that he will be right in.

The Court: All right. Would you like me to withhold [fol. 1459] hearing anybody else until he comes in?

Mr. Stockhausen: Well, I think that if we could just wait a moment, it might help matters.

The Court: All right.

(A pause.)

Mr. Adams: May it please the Court, may I apologize for having kept you waiting. The difficulties were with the different people that I had to contact in time and they were as might be anticipated or expected.

The Court: That is all right.

Mr. Adams: During the night, and at a very late hour, we were able to come to a solution which, if your Honor approves, we can deal with now in this respect:

There is no time for us to prepare a series of papers because of Mr. Teitelbaum's problem on Monday.

The Court: Will you speak just a little louder, please?

Mr. Adams: I am sorry. Mr. Teitelbaum's problem on Monday, making an application returnable to Judge McGivern on that day, as I understand it—is that right?

Mr. Teitelbaum: Yes, that is so.

Mr. Adams: As we indicated last night, he has a good [fol. 1460] many practical problems, even with this solution it being necessary for Mr. Teitelbaum to go forward before Judge McGivern.

My proposal to your Honor, if it meets with Mr. Teitelbaum's agreement also, would be that we would endeavor to dictate upon the record, in the form of a stipulation on the record before your Honor, which we could later agree to in writing, but in a formal sense and in a writing, and sign it, but until this very minute, when I walked into the courtroom, I did not know if we would be able to conclude, and I would think that we would save a great deal of time, your Honor, because I know you have other pressing obliga-

tions, if you could give Mr. Teitelbaum and myself a very few minutes in which to agree, amongst ourselves, as to what we want to put on the record.

Would that be agreeable to you, Mr. Teitelbaum?

Mr. Teitelbaum: That is agreeable to me, sir, with this further suggestion, however, in view of our time problem:

If I understand correctly from what Mr. Adams has just said, and from a moment's conversation I had with him before court came into session, he is no longer opposing the entry of the order which has been submitted to your Honor [fol. 1461] and has been the subject of the hearings here in the last three days.

If so, I would very much like to see us determine that matter, and then take a short recess and come back to your Honor perhaps with a stipulation that is not only satisfactory to me representing the defendant Kirby, but also satisfactory to counsel for the plaintiffs who, of course, have an interest in the matter as well.

The Court: Am I right in understanding that what you propose would not affect the proceedings that have been projected for the settlement of the Kirby claim?

Mr. Adams: No. Our proposal, in broad outline—

The Court: Never mind what it is. Would it be all right if I simply signed the order now and let them go ahead?

Mr. Adams: No. Would we be better advised to enter one order?

Mr. Teitelbaum: I don't think that time permits us to try to do that at this late hour. I think at best we may have to go before Judge McGivern on two parallel orders, but I think that we ought to go forward and put this order which we have been considering extensively in the works so that we can get it before the State Court on Monday.

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[fol. 1462] The Court: I think what you are doing is saying that I had better see what happens as a result of this next conference, and if the result is as favorable as we hope, your point would be moot.

Mr. Bijur: Absolutely.

The Court: Then, be as fast as you can, Mr. Teitelbaum, and I will not sign the order for a few minutes.

Mr. Teitelbaum: Very well, sir. Shall we take a short recess?

The Court: Yes. The Court will take a short recess.

(Short recess.)

Mr. Teitelbaum: May it please the Court, I am happy to say that in line with the suggestion of your Honor, we have been sitting here since court recessed and have reviewed the proposed basis for a settlement with all the other defendants. We have done so with Mr. Adams representing the Murchison and Richardson interests, with Mr. [fol. 1463] Daly representing the Young estate and Mrs. Young's interests, and, of course, the several counsel for the plaintiff who are here present representing the interests of the plaintiff.

We propose to have each of the representatives of the Murchison interests and Richardson interests and the Young interests make their statements to the Court as to their understanding of the deal, but we are also agreed that before doing so it would be appropriate to submit at this time the proposed order which your Honor has had under consideration now since Tuesday, and I am authorized to say that this order in the form submitted to you has the consent and approval not only of those who are recited herein as having consented, but also the approval of Mr. Daly and of Mr. Adams on behalf of their respective clients.

I may say, your Honor, that that order is in the same form as was before you yesterday, with one exception, in paragraph 1, where there has been a deletion, in which all parties are agreed.

The old copy shows the original form before the deletion.

The Court: What is the purpose of the change?

Mr. Teitelbaum: The purpose of the change, your Honor, was to facilitate the matter time-wise, since the original [fol. 1464] exception in the original order would have required us to come back before your Honor before 4 o'clock

on December 30th, with the possibility that there might then be further difficulties.

The Court: I have signed the order in its present form.

Mr. Teitelbaum: Thank you, sir.

Now, perhaps your Honor would wish to hear Mr. Adams and Mr. Daly.

Mr. Adams: May it please your Honor—may I proceed, sir?

The Court: If you please, Mr. Adams.

Mr. Adams: May it please your Honor, I make this statement on behalf of Clint W. Murchison and John D. Murchison, individually and doing business as Murchison Bros., and Clint W. Murchison, Sr. I also make the statement on behalf of John Connally, Perry Bass and Howell B. Smith, as executors of the estate of Sid W. Richardson, deceased, the statement with respect to the Richardson executors being made subject to what I will say hereafter.

I say, your Honor, that Mr. Teitelbaum and I wrote this out together in his handwriting, which is worse than mine, if anything.

[fol. 1465] Mr. Teitelbaum: That is impossible. I have a nice handwriting—when I am not writing shorthand.

Mr. Adams: The first statement is that the parties I have just described will adhere to the basic settlement as referred to in the amended supplemental stipulation which is attached to the order your Honor just signed, without any other or further payments or additions thereto.

Next, that the proposal is made intended to include all the necessary conditions of the Kirby supplemental amended stipulation, and it is intended that the same procedures and machinery be used for the consummation of this arrangement as is contained in what I will call the Kirby stipulation.

It is a condition, next, that the case be finally disposed of in all respects with suitable releases and discharges in all courts where that is necessary, not only as to the parties I have mentioned but as to all other parties.

This is intended to include in the very broadest sense all claims whether or not contained and alleged in any complaint in any court, anywhere.

I have said "all claims". I mean, all claims involved in [fol. 1466] this litigation or in these litigations, if I may put it that way.

The Court: That would be the inevitable result, anyway.

Mr. Adams: I intend to put ourselves in such a position that we will have no difficulty with any claims arising out of this welter of litigation.

The Court: That is the inevitable result where the corporation is a party.

Mr. Adams: I am looking forward to getting a general release from Alleghany Corporation for everybody.

* * * * * * *

[fol. 1467] Mr. Loeffler: I would like, if I may, your Honor, to arrange to have this order which you have signed entered in the clerk's office, in order that I can begin the mechanism.

The Court: You mean, you would like a very short adjournment for that purpose?

Mr. Loeffler: No. I would like to take this order on down, if I may.

The Court: By all means.

* * * * * * *

[fol. 1468] Mr. Brussel: Your Honor, needless to say, the plaintiffs in this action and their counsel are delighted that we are able to bring these proposals to this court, and we join in the statements that counsel for the other defendants have made, without reservation, on the assurance which they have given us—if they haven't said so in their statement, I am sure they will affirm it now—that when we go over to the State Court to present proposals there, the applications before the State Court will have their cooperation, and they will join with all counsel in attempting to persuade the State Court to bring this litigation finally to an end.

[fol. 1469] I cannot sit down, your Honor, without saying for myself and my associates how much we appreciate what this Court has given to this case.

I think we are peculiarly aware of the service that the Court has rendered, far and above, I would say, the call of your judicial duty, and we are enormously grateful.

Mr. Graubard: May I be heard, your Honor?

The Court: Yes, sir.

Mr. Graubard: I wish to join in the understanding expressed to the Court that the new offers meet with the approval of the objectant Rosen in the State Court.

I wish to point out to your Honor that we are fully in accord with no additional payment being made by the Murchison defendants, in view both of the rather substantial amount which is their burden under the original basic settlement, but above all because of the considerable value of the control of IDS, which in our opinion far exceeds all the amounts of cash combined.

In regard to the precise statements made by Mr. Adams and Mr. Daly, I think we have no disagreement whatsoever, sir. We point out, of course, that in regard to certain [fol. 1470] particulars, because these are oral statements, not written out fully, they do not quite meet with the intent of the persons who prepared them. Thus, we do not think that Mr. Adams expected to make payment 20 days after receipt of the final discharge of his clients, but rather after the proper order is served.

Mr. Adams: Oh, yes. There is no problem about that.

Mr. Graubard: I have some other elements of the same nature.

Mr. Daly's statement to which I might take exception—I mention this only by way of saying that I believe there are no basic differences between us—that the terms of the precise settlement agreements will be agreed upon.

The Court: If you have them in mind, I think it might be worthwhile to air them now. We have a few minutes more.

Mr. Graubard: Yes. I have a number of them. But in view of the fact that I am convinced that all parties are

speaking in the best of faith to your Honor now and that there are many details to be worked out, possibly before this day is over, I would prefer to conclude with my own particular appreciation of your Honor's perspicacity and [fol. 1471] patience with us in bringing this long, involved litigation to a close.

Thank you, your Honor.

May I add one other thing, sir.

We did not state previously when we had simply the Kirby release before the Court anything in regard to what counsel will do in the State Court on fees and allowances. I would like your Honor to know, however, in view of these additional statements made, that the objectant Rosen and his attorneys, the Breswick plaintiffs and their attorneys and such other stockholders and their counsel who may be entitled thereto may apply, as we intend to submit to Judge McGivern, at the foot of the order in the State Court stipulation, for reasonable allowances and counsel fees to be paid by Alleghany Corporation.

I think your Honor will be interested in knowing that we intend to put that burden on Judge McGivern rather than on your Honor.

[fol. 1472] Mr. Teitelbaum: May it please the Court, speaking for the defendant Kirby, who is also vitally interested in the affairs of Alleghany Corporation, this is a happy consummation of what he has thought would be in the best interests of the corporation and all concerned, which, as I indicated earlier to you, yesterday, he attempted to bring about in cooperation with the other present defendants here some weeks ago.

Failing to do so then, he found it necessary to proceed here separately. But I think I can speak for him in saying that he is and will be delighted if this litigation, which has gone on for so long and has been so costly to the corporation as well as to the other parties involved, can be brought to a constructive solution, which will result in the payment of an aggregate of some $3,000,000 to the corporation and in the return of the control of IDS to the corporation.

Speaking for myself, I wish to join with the others who have spoken here in expressing my appreciation of your patience and wisdom in helping us resolve this matter.

There is one point that Mr. Adams calls to my attention, which is well taken.

Yesterday—I think it was Mr. Brussel who spoke for [fol. 1473] the parties to the original stipulation in reading in a further stipulation, that plaintiffs and their counsel would cooperate and consent to the entry of appropriate orders dismissing the action in the Federal Court if and when the State Court settlements are approved and effectuated. That further stipulation, I take it, is appropriate in regard to the further settlements which are now being put upon the record.

Mr. Adams wanted me to suggest it, because in the statements which he and Mr. Daly made, the reference was solely to the so-called written Kirby stipulation, and this will clarify that point, I hope.

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[fol. 1474] The Court: Gentlemen, may I have your attention for just a minute?

You said some very kind things about me which were completely undeserved because this has been an outstanding example of what is true in almost all cases, that the result of litigation depend upon the lawyers rather than upon [fol. 1475] the Court, and I have been simply amazed, all through this litigation, at the fidelity of counsel to their respective clients, at their industry, at their skill and learning, and I want to thank you all for this happy result in which I have had a very small part.

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[fol. 1476]

IN THE UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT No. 31

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 98-371

BRESWICK & Co., et al.,

Plaintiffs,

—against—

O. HENRY BRIGGS, et al.,

Defendants.

ORDER

It appearing that the defendant Allan P. Kirby has entered into a Supplemental Stipulation of Settlement dated December 22, 1959, a copy of which as amended and dated December 24, 1959 is attached hereto and hereinafter referred to as the Supplemental Stipulation of Settlement, in the action entitled *Zenn* v. *Anzalone*, pending in the Supreme Court of the State of New York, Index No. 7244/1954, which is satisfactory to counsel for plaintiffs herein, and it further appearing that said Supplemental Stipulation of Settlement is conditional upon the vacation as to defendant Allan P. Kirby of the order made and entered herein on October 27, 1955 so as to permit defendant Kirby to plead in bar of this action any judgment entered in the Supreme Court of the State of New York [fol. 1477] upon such Supplemental Stipulation of Settlement, and/or any release authorized by such Court,

Now, upon reading the aforesaid Supplemental Stipulation of Settlement, and upon the consent of Rosston, Hort & Brussel, attorneys for plaintiffs Breswick & Co. and Myron Neisloss, Battle, Fowler, Neaman, Stokes & Kheel, attorneys for plaintiff Clarence W. Bailey, Charles T. Ireland, Jr., attorney for defendant Alleghany Corporation, and Donovan Leisure Newton & Irvine, attorneys for defendant Kirby, it is

1. ORDERED that the said order heretofore made and entered herein on October 27, 1955, be and the same hereby is vacated as to defendant Allan P. Kirby; and it is further

2. ORDERED that nothing herein contained shall in any way be construed to release any claims or rights of plaintiffs herein and Alleghany Corporation against any defendant herein other than Allan P. Kirby, and all such claims and rights are reserved to said plaintiffs and Alleghany Corporation; and it is further

3. ORDERED that in the event judgment is recovered upon any cause of actio or claim as to which defendant Kirby is jointly liable with one or more other defendants, the amount of the judgment on said cause of action or claim shall be reduced by the proportionate share thereof which defendant Kirby would have been required to pay had he not entered into the aforesaid Supplemental Stipula-
[fol. 1478] tion of Settlement, and had all other defendants jointly liable for the judgment on said cause of action or claim paid their respective proportionate shares of such judgment in full.

Dated: New York, N. Y.,
December 24, 1959

E. J. DIMOCK
U. S. D. J.

Entry of the foregoing
Order is consented to:

ROSSTON, HORT & BRUSSEL
Rosston, Hort & Brussel
Attorneys for Plaintiffs
Breswick & Co. and Myron Neisloss

BATTLE, FOWLER, NEAMAN, STOKES & KHEEL
Battle, Fowler, Neaman, Stokes & Kheel
Attorneys for Plaintiff
Clarence W. Bailey

DONOVAN LEISURE NEWTON & IRVINE
Donovan Leisure Newton & Irvine
Attorneys for Defendant
Allan P. Kirby

CHARLES T. IRELAND, JR.
Attorney for Alleghany Corporation

[fol. 1478a]

IN THE UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT No. 33

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil No. 92-205

SADIE ZENN, HENRY MENCHER, BERNARD LIEBERMAN, ABRAHAM M. FISTEL, FREDA BLUMENTHAL, JEANETTE ANNENBERG, SADIE B. UNGER, JACOB HAIMOWITZ, JOSEPH WEISMAN and CARL M. SIROTY,

Plaintiffs,

against

J. J. ANZALONE,
O. HENRY BRIGGS,
THOMAS J. DEEGAN, JR.,
CYRUS S. EATON,
WALTER W. FOSKETT,
HENRY J. GUILD,
ALLAN P. KIRBY,
HERMAN R. NEFF,
BROOKS POTTER,
ANDREW VAN PELT,
ROBERT R. YOUNG,
CLINT W. MURCHISON,
SIDNEY W. RICHARDSON,

CLINT W. MURCHISON, JR. and JOHN D. MURCHISON, individually and as partners, doing business under the firm name and style of MURCHISON BROTHERS,

and

ALLEGHANY CORPORATION,

Defendants.

SUMMONS ON CONSOLIDATED ACTION

To the above named Defendants:

You are hereby summoned and required to serve upon Pomerantz Levy & Haudek, general counsel for plaintiffs,

whose address is 295 Madison Avenue, New York 17, N. Y., an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

WILLIAM V. CONNELL,
Clerk of Court.

JAMES E. VALECHE,
Deputy Clerk.

[Seal of Court]

Date: May 20, 1954.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

[fol. 1479]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil No. 92-205

SADIE ZENN, HENRY MENCHER, BERNARD LIEBERMAN, ABRAHAM M. FISTEL, FREDA BLUMENTHAL, JEANETTE ANNENBERG, SADIE B. UNGER, JACOB HAIMOWITZ, JOSEPH WEISMAN and CARL M. SIROTY,

Plaintiffs,

against

J. J. ANZALONE,
O. HENRY BRIGGS,
THOMAS J. DEEGAN, JR.,
CYRUS S. EATON,
WALTER W. FOSKETT,
HENRY J. GUILD,
ALLAN P. KIRBY,
HERMAN R. NEFF,
BROOKS POTTER,
ANDREW VAN PELT,
ROBERT R. YOUNG,
CLINT W. MURCHISON,
SIDNEY W. RICHARDSON,

CLINT W. MURCHISON, JR. and JOHN D. MURCHISON, individually and as partners, doing business under the firm name and style of MURCHISON BROTHERS,

and

ALLEGHANY CORPORATION,

Defendants.

CONSOLIDATED AMENDED COMPLAINT

Plaintiffs, for their consolidated amended complaint, allege, upon information and belief, except that each plaintiff alleges the matters set forth in paragraphs "2", "4", "28" and "44", so far as they concern himself or herself, upon knowledge:

FIRST COUNT

Against defendants J. J. Anzalone, O. Henry Briggs, Thomas J. Deegan, Jr., Cyrus S. Eaton, Walter W. Foskett, Henry J. Guild, Allan P. Kirby, Herman R. Neff, Andrew Van Pelt, Robert R. Young, Clint W. Murchison, Sidney W. Richardson and Alleghany Corporation.

1. The jurisdiction of the Court rests upon diversity of citizenship.

2. (a) Plaintiffs Sadie Zenn, Henry Mencher, Bernard Lieberman, Freda Blumenthal, Jeanette Annenberg, Jacob Haimowitz, Joseph Weisman and Carl M. Siroty are citizens of New York.

(b) Plaintiff Abraham M. Fistel is a citizen of Massachusetts. He alleges no claims against defendants O. Henry Briggs, Henry J. Guild and Brooks Potter.

(c) Plaintiff Sadie B. Unger is a citizen of New Jersey. She alleges no claims against defendant Allan P. Kirby.

3. (a) The individual defendants named in this complaint are citizens of states other than New York, Massachusetts and New Jersey, except that defendants O. Henry Briggs, Henry J. Guild and Brooks Potter are citizens of [fol. 1480] Massachusetts and defendant Allan P. Kirby is a citizen of New Jersey.

(b) Defendant Alleghany Corporation ("Alleghany" hereinafter) is a corporation organized under the laws of Maryland.

(c) The amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000.

4. (a) The plaintiffs hereinafter named are the owners and holders of shares of the common stock of Alleghany in the amounts, and they have been stockholders of Alleghany since the times, hereinafter set forth opposite their respective names:

Plaintiff	*Number of shares owned and held*	*Time of becoming a stockholder*
Sadie Zenn	500	1951
Bernard Lieberman	500	1945
Abraham M. Fistel	500	prior to 1945
Freda Blumenthal	1500	" " 1945
Jeanette Annenberg	200	" " 1945
Sadie B. Unger	100	" " 1945
Jacob Haimowitz	400	1951
Joseph Weisman	500	Jan. 18, 1950
Carl M. Siroty	5200	Oct. 6, 1949

(b) Plaintiff Henry Mencher is the owner and holder of 10 shares of the 5½% cumulative preferred stock, Series A, of Alleghany and has been a stockholder of Alleghany since 1948.

(c) Plaintiffs bring this action derivatively on behalf and in the right of Alleghany.

(d) Plaintiffs have been stockholders of Alleghany at the time of the transactions herein complained of.

(e) This action is not brought collusively to confer upon this Court jurisdiction which it otherwise would not have.

5. Alleghany's business did at all times herein mentioned and now does consist substantially of the investment and re-investment of its funds in a diversified portfolio of securities.

6. (a) In the latter part of 1953 and in 1954, the defendants Briggs, Foskett, Guild, Kirby, Neff, Van Pelt and Young constituted the board of directors of Alleghany. In addition, defendant Anzalone was a director of Alleghany until February 17, 1954, at which date he resigned and was replaced by defendant Deegan.

(b) Defendants Young and Kirby were at all times herein mentioned and now are, respectively, the chairman of the board and the president of Alleghany.

(c) In or about May 1937, defendants Young and Kirby acquired about 42% of Alleghany's voting stock and they thereupon assumed the offices hereinbefore mentioned. The other voting shares of Alleghany, listed and actively traded on the New York Stock Exchange, are scattered among a [fol. 1481] large number of stockholders. By virtue of the premises, defendants Young and Kirby did at all times herein mentioned and now do dominate Alleghany's board of directors and determine the conduct of its business, policies and affairs, including the transactions hereinafter alleged.

7. The transactions hereinafter alleged were caused by the individual defendants named in this count pursuant to a conspiracy among them. The object of the conspiracy was to enable defendants Young and Kirby to use the funds, assets, personnel and facilities of Alleghany to their private advantage at the expense of Alleghany.

8. (a) For many years defendants Young and Kirby have aspired and attempted to assume the management and to become members of the board of directors of The New York Central Railroad Company (the "New York Central" hereinafter).

(b) The New York Central is a railroad company organized in New York and other states. It owns, directly and through subsidiaries, the second largest railroad system in this country. Its authorized capital stock consists of 10,000,000 shares of no par value common stock, of which 6,447,410 shares are issued and outstanding and entitled to vote. Such shares, listed and actively traded on the New York Stock Exchange, are scattered among many thousands of stockholders.

9. (a) In January and February 1954, and for some previous time, the largest block of New York Central stock, amounting to 800,000 shares or about 12.4% of the total shares outstanding, was held by The Chesapeake & Ohio Railway Company (the "C. & O." hereinafter), a railroad

company organized under the laws of Virginia and West Virginia.

(b) For many years and until January 19, 1954, Alleghany owned substantial amounts of the voting stock of the C. & O., constituting working control. During such times, defendants Young and Kirby were directors of the C. & O., defendant Young being the chairman of the board. Other directors of Alleghany (defendants Anzalone, Guild and Van Pelt) were likewise directors or officers of the C. & O.

(c) Defendant Eaton, a friend of defendants Young and Kirby, was likewise a director of the C. & O.

10. The aforesaid attempts of defendants Young and Kirby to assume the management and to become members of the board of directors of the New York Central had failed because:

(a) Under the Interstate Commerce Act and orders of the Interstate Commerce Commission, their and Alleghany's connection with the C. & O. rendered them ineligible for directorships or other managerial positions with the New York Central; and

(b) The C. & O. was unable to vote its 800,000 shares in the New York Central because, under orders of the Interstate Commerce Commission, these shares, while owned by the C. & O., had to be and were placed in a voting trust with The Chase National Bank of the City of New York, the power to vote such shares being vested [fol. 1482] exclusively in said bank. The voting trust was to end upon the transfer of the shares to any party not affiliated with the C. & O.

11. In order to make themselves eligible for directorships and managerial positions with the New York Central, defendants Young and Kirby, in concert with the other directors of Alleghany and with defendant Eaton, caused the following things to be done:

(a) On or about January 19, 1954, Alleghany sold its entire holdings (104,854 shares) of C. & O. common

stock to defendant Eaton at the price of $34.29 per share or an aggregate of $3,595,118.

(b) At or about the same time, defendants Young, Kirby, Guild and Van Pelt resigned their positions with the C. & O.; defendant Anzalone resigned his position with Alleghany; and they assisted in the appointment of defendant Eaton as the new chairman of the board of the C. & O. and the appointment of Eaton's nominees to the board of directors of the C. & O.

12. The sale by Alleghany of its aforesaid block of C. & O. stock constituted a waste of Alleghany's assets because:

(a) The C. & O.'s common stock had earned and paid dividends during the darkest days of the early thirties; in 1952 and 1953 its annual common stock dividend amounted to $3 per share. It had a consistent record of high earnings which, in 1953, had risen to an all-time peak of $6.04 per common share. The C. & O. was in the finest physical condition ever attained in its history.

(b) The fair value of the aforesaid block of C. & O. stock, carrying control of the C. & O., was substantially in excess of the price received therefor by Alleghany.

(c) Alleghany had no business reasons for selling the block of C. & O. stock, such sale being only in the personal interest of defendants Young and Kirby.

13. Having thus separated their connections with the C. & O., defendants Young and Kirby requested the New York Central's board of directors to elect them as members of that board. The board of directors of the New York Central rejected that request on or about February 10, 1954.

14. (a) Defendants Young and Kirby thereupon publicly announced that, at the forthcoming annual meeting of stockholders of the New York Central to be held May 26, 1954, they would seek the election of a new board of

directors consisting of themselves and of a slate of candidates to be designated by them.

(b) The management of the New York Central publicly announced that it would resist this plan and seek the re-election of the present board of directors.

(c) Both sides indicated that they would seek to acquire stock of the New York Central and that they would solicit the votes or proxies of the stockholders of the New York Central for the contest at the forthcoming annual meeting.

[fol. 1483] 15. Upon the public disclosure of the impending proxy fight, the market price of the New York Central's common stock rose from a low of about 18½ to a high of 26 on February 15, 1954, and has since dropped to a level of about 21½.

16. (a) The aforesaid 800,000 share block of New York Central stock owned by the C. & O. was one of the most important factors in the forthcoming voting contest.

(b) Defendants Young and Kirby desired to assure themselves of the votes to be cast by said block.

(c) They conceived the plan of causing defendants Murchison and Richardson, who had been close friends and business associates of Young and Kirby for several years, to acquire such stock, and of facilitating such acquisition by causing Alleghany to provide a substantial part of the necessary financing and a guaranty to Murchison and Richardson against possible loss.

17. At the instigation of defendants Young and Kirby, and on or about February 23, 1954, defendants Murchison and Richardson agreed to buy, and the C. & O. agreed to sell, the C. & O.'s aforesaid 800,000 shares of New York Central stock at the price of $25 per share, or an aggregate price of $20,000,000; and such agreement of purchase and sale has since been consummated.

18. At or about the same time, and in order to induce defendants Murchison and Richardson to make such purchase, defendants Young and Kirby caused Alleghany to

enter into an agreement or agreements with defendants Murchison and Richardson which provided in substance:

(a) Alleghany was to loan the sum of $5,000,000 to defendant Murchison and the sum of $2,500,000 to defendant Richardson. The loans were to bear 4½% interest per annum and were to be repaid September 15, 1954.

(b) From July 15 to September 15, 1954, defendants Murchison and Richardson were to have the option of selling all or part of 400,000 shares of New York Central's common stock to Alleghany at $25 per share. Upon the exercise of the options concerning all or part of 200,000 shares, Alleghany, Murchison and Richardson were to enter into joint venture agreements the precise nature of which has not been revealed.

19. These loans aggregating $7,500,000 were actually granted on or about March 15, 1954.

20. In connection with these transactions, defendants Young and Kirby had an understanding with defendants Murchison and Richardson that the latter would vote the New York Central stock acquired by them in favor of defendants Young and Kirby and their proposed slate of directors. Alleghany, in turn, was to and did assist defendants Murchison and Richardson in procuring additional financing for their purchases of New York Central stock.

[fol. 1484] 21. The aforesaid transactions were of great benefit and advantage to defendants Young and Kirby, but detrimental to and against the best interests of Alleghany because:

(a) Alleghany had no business reason for committing $7,500,000 of its funds to a six month loan to defendants Murchison and Richardson.

(b) Said sum could have been used more profitably and advantageously in the ordinary business of Alleghany.

(c) Alleghany had no business reason for granting defendants Murchison and Richardson the above mentioned options.

(d) The option price was excessive. The market price of New York Central's common stock was 24⅛ high, 23⅝ low on February 23, 1954. It was 24 high, 23⅝ low on March 15, 1954. Even these prices reflected a temporary inflation caused by the voting contest between the incumbent management of the New York Central and the defendants Young and Kirby. The market price has since fallen to about 21½; it was and is foreseeable that, upon the termination of the voting contest on May 26, 1954, the market price will revert to its previous level of about 18½.

(e) If defendants Murchison and Richardson should elect to exercise their aforesand options, it would be extremely difficult for Alleghany to re-sell the large block of stock thus acquired without further depressing the market price thereof.

(f) If defendants Young and Kirby and the other directors of Alleghany deemed it advantageous for Alleghany to acquire 400,000 shares of New York Central stock at the price of $25 per share, they could have arranged for Alleghany's outright purchase thereof from the C. & O., in which event Alleghany would have profited from any rise in the market price of the New York Central stock. The arrangements actually made will deny such an advantage to Alleghany since it was and is foreseeable that defendants Murchison and Richardson will not exercise their aforesaid options if the market price should rise above $25.

(g) The value of the aforesaid options is substantially in excess of $1,000,000; Alleghany granted these options without consideration and solely in the interest of defendants Young and Kirby.

22. Defendants Young and Kirby took additional steps to cause Alleghany to become a partisan in the struggle for control of the New York Central by embarking it upon a program of aiding Young and Kirby in that contest.

23. Pursuant to this program, Alleghany placed and paid for numerous full page advertisements in various newspapers glorifying and extolling defendants Young and Kirby and attacking the New York Central's present board and management and the interests allegedly represented by them. In addition, Alleghany engaged at its own expense in a vast campaign by mail, telephone, personal solicitation and otherwise for the purpose of securing proxies of New York Central's stockholders in favor of defendants Young and Kirby and their proposed slate of directors. Alleghany also furnished a clearing house and clerical headquarters [fol. 1485] for the proxy contest. Its funds, assets, personnel and other facilities, as well as those of its subsidiaries and affiliates, have been diverted in these and other respects from the regular business of Alleghany, its subsidiaries and affiliates to propagandizing for defendants Young and Kirby with respect to the aforesaid proxy fight. These practices were wasteful and not justified by any proper corporate purpose of Alleghany. The practices continue to date and will continue until the termination of the proxy fight.

24. Demand upon the board of directors of Alleghany to bring this action would be futile because:

(a) All directors of Alleghany have participated in the transactions complained of.

(b) They are dominated and controlled by defendants Young and Kirby.

(c) The institution of this action by the directors would place it in hostile hands and would prevent its effective prosecution.

25. Demand upon the stockholders of Alleghany to bring this action would be futile because:

(a) Under the laws of Maryland and the charter and by-laws of Alleghany, the officers and directors, not the stockholders, manage the affairs of Alleghany, including the bringing of all actions for it. The stockholders as a body cannot by resolution manage Alleghany or compel its management to bring suit.

(b) A stockholders' resolution directing the bringing of this action would have its conduct in the hostile hands of Alleghany's management.

(c) Defendants Young and Kirby own and control a substantial part of Alleghany's voting stock, constituting working control. The remaining voting stock of Alleghany is held by several thousand stockholders residing in nearly every state of the Union and several foreign countries. The stock of Alleghany is listed and actively traded on the New York Stock Exchange. A proxy fight with Alleghany's management would be hopeless and would impose an unconscionable burden and expense on plaintiffs. Extended delay would result seriously prejudicing the prosecution of the claims herein through laches and the operation of the statute of limitations.

26. Plaintiffs have no adequate remedy at law.

SECOND COUNT

On behalf of all plaintiffs except Sadie Zenn and Jacob Haimowitz against defendants J. J. Anzalone, O. Henry Briggs, Walter W. Foskett, Allan P. Kirby, Herman R. Neff, Brooks Potter, Andrew Van Pelt, Robert R. Young and Alleghany Corporation.

27. The jurisdiction of this Court is based upon § 27 of the Securities Exchange Act of 1934 (15 U. S. C. § 78aa), and upon diversity of citizenship.

[fol. 1486] 28. Plaintiffs reallege paragraphs "2" and "3".

29. The transactions hereinafter alleged occurred in large part within the Southern District of New York.

30. Plaintiffs reallege paragraphs "4", "5", "6(b)" and "6(c)".

31. The common stock, the prior preferred stock, and the preferred stock, Series A, of Alleghany were at all times herein mentioned and now are listed and actively traded on the New York Stock Exchange, a national securities exchange.

32. In 1949 and 1950, at the time of the transactions herein complained of, the individual defendants named in this count, together with Frank B. Bateman and Robert W. Purcell, constituted the entire board of directors of Alleghany.

33. The transactions hereinafter alleged were caused by the individual defendants named in this count pursuant to a conspiracy among them. The object of the conspiracy was to enable defendants Young and Kirby to enrich themselves at the expense of Alleghany.

34. (a) In or about April and May, 1949, Alleghany acquired 104,405½ shares (more than 90%) of the outstanding common stock of a Minnesota corporation known as Investors Diversified Services, Inc. ("IDS" hereinafter) at an average cost of $18.25 per share.

(b) In or about the same month Alleghany acquired 48,225.61 shares (more than 27%) of the outstanding Class A common stock of IDS at an average cost of $8.1453 per share.

(c) Each share of the common stock of IDS is entitled to one vote per share; the Class A common stock of IDS is non-voting. In all other respects both classes of stock have equal rights.

(d) Both classes of IDS stock are and are traded over-the-counter.

35. On or about December 6, 1949 Alleghany's board of directors resolved to permit Alleghany's officers to exchange preferred stock of Alleghany held by them for the IDS Class A stock held by Alleghany. In connection with such exchange, the preferred stock of Alleghany was to be valued at its market price; the IDS Class A stock was to be valued at its market price or at its cost to Alleghany, whichever would be higher. Such market prices were to be determined as of the final exchange date. The exchange was to be conditional upon ratification by Alleghany's common stockholders at their annual meeting on May 3, 1950.

36. (a) On January 20, 1950 Alleghany accepted a tender by defendant Young of 2,420 shares of Alleghany's preferred stock, Series A, at $81 per share in exchange for 24,063 IDS Class A shares, at $8.1453 per share, plus $19.65 in cash.

(b) On the same day Alleghany accepted a tender by defendant Kirby of 2,420 shares of Alleghany's preferred stock, Series A, at $81 per share, in exchange for 24,062 IDS Class A shares, at $8.1453 per share, plus $27.79 in cash.

[fol. 1487] (c) Defendants Young and Kirby made such tenders, and Alleghany accepted them, pursuant to the aforesaid directors' resolution of December 6, 1949 and subject to ratification or rejection by Alleghany's common stockholders.

37. (a) In order to obtain the necessary stockholder approval, Alleghany mailed to its common stockholders a notice of annual meeting and proxy statement dated April 6, 1950 (the "proxy statement" hereinafter).

(b) The proxy statement notified the stockholders that Alleghany's annual meeting of May 3, 1950 would be held for the purpose, among others, of ratifying or rejecting the aforesaid exchange. It set forth the text of the directors' resolution of December 6, 1949. It set forth the times and the cost at which Alleghany had acquired its holdings of

IDS stock. It described the legal incidents of the two classes of IDS stock. It stated that the market price of the IDS Class A stock on March 31, 1950 was $9 bid, $9.75 asked per share; and that the market price of Alleghany's preferred stock, Series A, on said date, was $70 per share. It stated that the transaction was advantageous to Alleghany; and it requested the common stockholders to approve it by voting in its favor or executing management proxies.

(c) Pertinent portions of the text of the proxy statement, including the text of the directors' resolution of December 6, 1949, are annexed hereto as Exhibit "A".

38. At their annual meeting of May 3, 1950, Alleghany's common stockholders purportedly adopted a resolution approving the aforesaid exchange.

39. (a) On or about May 15, 1950 Alleghany and defendant Kirby purportedly consummated the aforesaid transaction by the exchange of 2,420 shares of Alleghany's preferred stock, Series A, for 24,062 IDS Class A shares, and a cash payment by Alleghany to defendant Kirby of $27.79.

(b) On May 15, 1950 the market value of Alleghany's preferred stock, Series A, was $68 per share, and the market value of the IDS Class A stock was $13 per share.

(c) Accordingly, the consideration which Alleghany received from defendant Kirby fell short of the amount required by the directors' resolution of December 6, 1949 by the sum of $148,273.79.

40. (a) On or about May 23, 1950 Alleghany and defendant Young purportedly consummated the aforesaid transaction by the exchange of 2,420 shares of Alleghany's preferred stock, Series A, for 24,063 IDS Class A shares, and a cash payment by Alleghany to defendant Young of $19.65.

(b) On May 23, 1950 the market value of Alleghany's preferred stock, Series A, was $70.50 per share, and the market value of the IDS Class A stock was $13 per share.

(c) Accordingly, the consideration which Alleghany received from defendant Young fell short of the amount required by the directors' resolution of December 6, 1949 by the sum of $142,228.65.

[fol. 1488] 41. (a) By reason of the premises, the aforesaid exchange transactions should be rescinded or, in the alternative, the individual defendants should be required to account to Alleghany for the aforesaid shortage of the exchange price.

(b) The aforesaid exchange transactions should also be rescinded for the additional reasons set forth in paragraphs "42" and "43".

42. The notice of annual meeting and proxy statement of April 6, 1950 (as supplemented by a further statement mailed by Alleghany to its stockholders on or about April 26, 1950), to the knowledge of the individual defendants, contained statements which, at the time and in the light of the circumstances under which they were made, were false and misleading with respect to material facts and omitted to state material facts necessary to make the statements therein not false or misleading, as follows:

(a) During the latter part of the year 1949 and the early part of the year 1950, the earnings of IDS had taken a spectacular upturn. Whereas IDS has sustained a loss of $384,597 ($1.32 per share) in 1948, and a loss of $79,087 ($.27 per share) during the first half of the year 1949, it realized net earnings of $481,693 ($1.65 per share) during the second half of the year 1949, and net earnings of $631,217 ($2.17 per share) during the first three months of the year 1950 (or, on an annual basis, $8.68 per share, i.e., more than the entire price paid by defendants Young and Kirby). These earnings developments were neither revealed in the proxy statements nor otherwise published.

(b) This improvement in the earnings of IDS reflected a trend to further improvements which was

foreseeable to and foreseen by the individual defendants. The net earnings of IDS for the first half of the the year 1950 amounted to $2,341,587; and its net earnings for the entire year 1950 amounted to $6,036,745 (exclusive of IDS' proportionate share in the undistributed earnings of its subsidiaries in the amount of $417,666). Whereas said 1950 net earnings of IDS thus amounted to $20.76 per share, Alleghany received for its IDS Class A shares in May 1950 an average price equivalent to $6.96 per share.

(c) This earnings trend was also reflected in a spectacular increase of the market value of the IDS Class A stock, which was foreseeable to and foreseen by the individual defendants. Whereas the sales price set forth in the proxy statement was $8.1453 per share, the market price rose to $28 by the end of the year 1950, to $37¾ by the end of 1951, to $89½ by the end of 1952, to $100 by the end of 1953, and to about $200 at this time.

43. (a) By reason of the premises, the proxy statement and the notice of meeting violated § 14(a) of the Securities Exchange Act of 1934 and Rule X-14A-9 of the Securities and Exchange Commission.

(b) The majority of the votes at the stockholders' meeting of May 3, 1950 was cast by means of management proxies procured through the proxy statement.

(c) A majority of the stockholders' votes cast at the meeting of May 3, 1950 was void.

[fol. 1489] (d) The stockholders' resolution purportedly approving the aforesaid exchange transactions was void.

(e) Since the aforesaid exchange transactions were, by their terms, subject to stockholder approval, they are likewise void.

44. Plaintiffs discovered the matters alleged in paragraph "42" within less than one month before commencement of the actions consolidated herein.

45. Demand on the board of directors of Alleghany to bring this action would be futile because:

(a) The present board of directors of Alleghany consists of the defendants Briggs, Deegan, Foskett, Guild, Kirby, Neff, Van Pelt and Young.

(b) A majority of said directors participated in the transactions complained of.

(c) The directors are dominated and controlled by defendants Young and Kirby.

(d) The institution of this action by the directors would place it in hostile hands and would prevent its effective prosecution.

46. Plaintiffs reallege paragraph "25".

47. Plaintiffs have no adequate remedy at law.

THIRD COUNT

Against defendants J. J. Anzalone, O. Henry Briggs, Walter W. Foskett, Henry J. Guild, Allan P. Kirby, Herman R. Neff, Andrew Van Pelt, Robert R. Young, Clint W. Murchison, Jr. and John D. Murchison, individually and as partners, etc., and Alleghany Corporation.

48. Plaintiffs reallege paragraphs "1" through "20" and "34".

49. Defendants Clint W. Murchison, Jr. and John D. Murchison are brothers and were at all times herein mentioned and now are co-partners doing business under the firm name and style of Murchison Brothers. They are the sons of defendant Clint W. Murchison.

50. (a) The Murchison brothers and members of their family have for a long time been close and intimate friends of defendants Young and Kirby. The Murchison brothers, members of their family, affiliates and associates have engaged in numerous business transactions with defendants Young and Kirby, their affiliates and associates.

(b) In and about December 1953 and thereafter, defendants Young and Kirby obtained and were desirous of obtaining various personal favors from the defendants Murchison and members of their family, including their financial and personal assistance in the forthcoming campaign of defendants Young and Kirby to secure control of the New York Central Railroad Company.

(c) In order thus to secure the favor, cooperation and assistance of the Murchison family, defendants Young [fol. 1490] and Kirby devised the plan of causing Alleghany to sell a substantial part of its holdings of IDS stock to the defendants Murchison Brothers at an inadequate price, upon terms unfavorable to Alleghany and contrary to the best interests of Alleghany, all as more fully hereinafter alleged.

(d) The transactions hereinafter alleged were caused by the individual defendants named in this count pursuant to a conspiracy among them.

51. In the latter part of December 1953 Alleghany sold to defendants Murchison Brothers 27,500 common shares (constituting about 24% of the total common stock outstanding) and 5,650 Class A shares of IDS. The price was $125 per share, an aggregate of $4,143,750, represented by 4% promissory notes of Murchison Brothers payable over a period of five years.

52. The purchase price was inadequate because:

(a) At the time of the sale defendants knew that the annual net earnings of IDS had taken a substantial upturn. Whereas the then published annual net earnings of IDS for the year 1952 were $3,833,030 ($13.18 per share), such net earnings for the year 1953 amounted to $5,898,066 ($20.29 per share).

(b) If the proportionate share of IDS in the undistributed earnings of its subsidiaries be added to the foregoing figures, the net earnings of IDS for the year

1952 amounted to $5,299,761 ($18.22 per share), whereas its net earnings for the year 1953 amounted to $7,908,055 ($27.20 per share).

(c) The aforesaid increase in the earnings of IDS was in substantial part due to developments in the last quarter of the year 1953. Whereas during the first three quarterly periods of 1953 the net earnings amounted to $3.46, $2.85 and $3.26 per share, respectively, such earnings for the last quarter of 1953 amounted to $10.72 per share.

(d) The market price of the IDS common stock at the end of December 1953 was approximately $101 per share. However, the aforesaid increases in the earnings of IDS were at that time not publicly known, but were known to the individual defendants. It was foreseeable to and foreseen by the individual defendants that such market price would experience a substantial rise in the near future. In fact, the market price of IDS stock rose to about $130 at the end of January, 1954, to about $136½ at the end of February, 1954, to about $178½ at the end of March, 1954, and to about $200 at this time.

(e) Alleghany's annual report for the year 1953 (which was not released until March 20, 1954) contains the following recitals, among others, concerning IDS:

"In the Spring of 1949, Alleghany purchased 104,405 shares of the voting stock (representing 91% of the total voting shares outstanding) of Investors Diversified Services, Inc., an investment company controlling or managing one of the world's largest groups of investment companies. At that time the company was handicapped by lack of any corporate surplus and its reserves for outsanding certificate liabilities were approximately $22 million below the [fol. 1491] amount the company would have been required to maintain under the Federal Investment Company Act of 1940 had it been subject to the pro-

visions of that Act. Furthermore, the company faced the maturity of over $380 million of its certificates prior to 1957 and these maturities had to be met out of assets, the liquidation of which presented serious difficulties and which were subject to possible substantial depreciation in the event of unfavorable business conditions.

"Today, under vigorous and sound policies of administration, the amount which would have to be added to the certificate reserve account to comply with the provisions of the Federal Investment Company Act has been reduced to approximately $6,300,000, all of it set aside and earmarked in the surplus account, which has grown to more than $23 million. Also, more than $193 million of the certificates which presented such a maturity problem in 1949 have been retired.

"Thus IDS now occupies a sound and enviable position at the top of the world's investment companies, with a unique and unmatchable sales organization of more than 2,000 men and investment and mortgage departments of the highest integrity. It is now geared for a future of almost unlimited opportunity to serve the investing public constructively and to broaden the base of our capitalistic system of free competitive enterprise."

(f) The fair value of the IDS stock sold by Alleghany to defendants Murchison Brothers far exceeded $125 per share.

53. (a) Alleghany had no business reason for selling a substantial portion of its control block of IDS stock.

(b) Alleghany had no business reason for committing a substantial part of its funds to a long-term personal loan to Murchison Brothers at a return of 4% annually.

(c) Such commitment of its funds was contrary to Alleghany's policy of either reenforcing its liquid position or

making investments offering the prospect of substantial appreciation.

54. Plaintiffs reallege paragraphs "45", "25" and "26".

FOURTH COUNT

Against defendants J. J. Anzalone, O. Henry Briggs, Walter W. Foskett, Allan P. Kirby, Herman R. Neff, Andrew Van Pelt, Robert R. Young and Alleghany Corporation.

55. Plaintiffs reallege paragraphs "1" through "5", "6 (b)" and "6(c)".

56. In 1952 and at the time of the transaction herein alleged, the individual defendants named in this count, together with Frank D. Bateman, Robert W. Purcell and Radcliffe Swinnerton, constituted the board of directors of Alleghany.

57. The transaction hereinafter alleged was caused by the then directors of Alleghany pursuant to a conspiracy among them.

58. In 1952 Alleghany entered into the following transaction with defendant Neff, one of its directors:

[fol. 1492] (a) Alleghany purportedly sold to defendant Neff 5,000 shares of the common stock of Portsmouth Steel Corporation at a price of $67,500 ($13.50 per share).

(b) Defendant Neff delivered to Alleghany his collateral promissory note in the sum of $67,500 due September 10, 1957, bearing interest at the rate of 4% per annum payable quarterly, and secured by the aforesaid 5,000 shares of common stock of Portsmouth Steel Corporation.

(c) It was expressly stipulated that defendant Neff was under no personal obligation to pay said promis-

sory note or to pay the purchase price for the stock sold to him.

(d) In the event of default, the rights of Alleghany under said note were to be discharged in full by the delivery to it of the collateral security held thereunder.

59. The aforesaid transaction constituted a gift by Alleghany of a valuable corporate asset to defendant Neff and was ultra vires and void because:

(a) Defendant Neff at once obtained the full legal title to and beneficial interest in the aforesaid stock, with the right to vote and to receive dividends, subject only to the security interest retained by Alleghany.

(b) Defendant Neff undertook no personal liability for the principal of or interest on the purchase price and the aforesaid collateral promissory note.

(c) Alleghany thus parted with valuable property rights and, in exchange, received nothing that it did not have prior to the transaction.

(d) The annual dividends on the Portsmouth Steel stock thus transferred to defendant Neff did, do and will continue to substantially exceed the annual interest on the note.

60. No part of the principal sum of $67,500 has been paid to Alleghany.

61. The present market value of the Portsmouth Steel Corporation common stock is about $11 per share.

62. Defendants have converted the aforesaid 5,000 shares of common stock of Portsmouth Steel Corporation to their own use and should account to Alleghany for its loss and their profits.

63. Plaintiffs reallege paragraphs "45", "25" and "26".

FIFTH COUNT

Against defendants J. J. Anzalone, O. Henry Briggs, Walter W. Foskett, Henry J. Guild, Allan P. Kirby, Herman R. Neff, Andrew Van Pelt, Robert R. Young and Alleghany Corporation.

64. Plaintiffs reallege paragraphs "1" through "5", "6(b)" and "6(c)".

[fol. 1493] 65. In July 1953, and at the time of the transaction herein alleged, the individual defendants named in this count constituted the board of directors of Alleghany.

66. The transaction herein alleged was caused by the then directors of Alleghany pursuant to a conspiracy among them.

67. (a) Chesapeake Industries, Inc. ("Chesapeake" hereinafter) is a corporation organized under the laws of Ohio.

(b) At all times herein mentioned defendants Young and Kirby, their families and nominees directly and indirectly owned and controlled sufficient stock of Chesapeake to constitute working control. Their proportionate interest in the outstanding capital stock of Chesapeake was greater than their proportionate interest in the outstanding capital stock of Alleghany.

(c) At all times herein mentioned defendants Young and Kirby selected the management and personnel of Chesapeake and controlled the conduct of its business and affairs.

(d) Kenneth M. Young, the brother of defendant Robert R. Young, was at all times herein mentioned the chairman of the board of Chesapeake. The principal offiicers of Chesapeake were directors, officers or employees of Alleghany, its subsidiaries or affiliates.

68. On or about July 14, 1953, Alleghany sold to the Pennsylvania Coal & Coke Corporation ("Pennsylvania"

hereinafter) a large block of stock of Industrial Brownhoist Corporation ("Brownhoist" hereinafter) for $2,900,382.38, payable partly in cash and partly in three promissory notes maturing on July 15th of each of the years 1954, 1955 and 1956.

69. In addition to said purchase price, Pennsylvania agreed to and did pay to Chesapeake a total commission of $111,995.50, partly in cash and partly through the delivery of three promissory notes having the same maturity dates as those mentioned in paragraph "68".

70. Chesapeake performed no services for Alleghany in the sale of said Brownhoist stock; the commission paid by Pennsylvania to Chesapeake actually constituted part of the purchase price; the amount of such commission should have been paid to Alleghany; its diversion to Chesapeake constituted a gift and waste of the corporate assets of Alleghany.

71. Plaintiffs reallege paragraphs "45", "25" and "26".

WHEREFORE, plaintiffs pray for judgment against the defendants as follows:

I. UPON THE FIRST COUNT:

Enjoining, temporarily and permanently, defendants Clint W. Murchison and Richardson from exercising the options alleged in paragraph "18";

[fol. 1494] II. UPON THE FIRST, SECOND AND THIRD COUNTS:

Rescinding the transactions alleged therein;

III. UPON ALL COUNTS:

(a) Requiring the individual defendants named therein to account to Alleghany for their profits and its losses;

(b) Allowing plaintiffs the costs and expenses of this action, including reasonable counsel and accountants' fees; and

(c) Granting plaintiffs such other and further relief as may be just.

POMERANTZ LEVY & HAUDEK

By WILLIAM E. HAUDEK
General Counsel for Plaintiffs
295 Madison Avenue
New York 17, N. Y.

[fol. 1494-a]

Exhibit A.

Excerpts from Alleghany Corporation's Proxy Statement of April 6, 1950.

* * * * * * * *

ACQUISITION BY CERTAIN OFFICERS OF INVESTORS DIVERSIFIED SERVICES, INC. CLASS A COMMON STOCK

The Corporation owns 104,505½ shares, or 90.9%, of the outstanding common stock of Investors Diversified Services, Inc. purchased at an average cost to the Corporation of $18.25 per share. Of these shares 104,405½ were purchased during the period April 11, 1949 to May 6, 1949 and 100 were purchased on February 16, 1950. The Corporation also owns 48,225.61 shares, or 27.4%, of the outstanding Class A common stock of Investors Diversified Services, Inc. purchased at an average cost to the Corporation of $8.1453 per share during the period April 8, 1949 to May 6, 1949.

The authorized capital stock of Investors Diversified Services, Inc. consists of 140,000 shares of common stock and 260,000 shares of common stock, Class A. Each share of common stock is entitled to one vote at all meetings of the stockholders; common stock, Class A is non-voting. Shares of capital stock of the corporation may be increased, reduced, or changed, or classes of preferred stock created, without the consent of holders of any class of stock other than common stock. Both classes of stock have equal rights in the event of liquidation, dissolution, or winding up of the Corporation, whether voluntary or involuntary, and no dividend may be declared or paid upon common stock

unless and until dividends at the same rate be paid upon common stock, Class A.

At the meeting there will be submitted to the common stockholders for ratification or rejection the matter of the acquisition by certain officers of shares of Investors Diversified Services, Inc. Class A common stock from the Corporation in exchange for Prior Preferred stock and Series A Preferred stock held by them pursuant to the following preambles and resolutions of the Board of Directors adopted at its meeting held December 6, 1949:

> WHEREAS, among the securities which had been considered as available to be offered to stockholders in exchange for the Corporation's outstanding Preferred stocks are the Corporation's holdings of 48,225.61 shares of Investors Diversified Services, Inc. Class A Common stock; and
>
> WHEREAS, counsel for the Corporation has advised in connection therewith that, inasmuch as the Corporation is in control of Investors Diversified Services, Inc., no offer to stockholders of shares of that company could be made without registration with the Securities and Exchange Commission and has advised that if the offering of Investors Diversified Services, Inc. Class A. Common stock was made to a limited number of persons registration would not be required; and
>
> WHEREAS, in view of the size of the holding and the costs and delays incident thereto, such registration is not deemed advisable; and
>
> [fol. 1494-b] WHEREAS, consideration having been given to a further offer, not a part of the public offer this day authorized, which would give to the Corporation's officers the right to exchange their holdings of Alleghany Prior Preferred stock and 5½% Preferred stock, Series A, for Class A Common stock of Investors Diversified Services, Inc. on exchange ratios which would be not less favorable to the Corporation in relation to the respective market prices of Alleghany Pre-

ferred stocks received and the Investors Diversified Services, Inc. stock delivered than the exchange ratios which are accepted by the Company pursuant to the public offer; and

WHEREAS, it is considered desirable that the Corporation receive either its cost or the market price, whichever is higher, of Investors Diversified Services, Inc. Class A Common stock which may be given in exchange, the current market price of such stock being approximately $5.50 per share and the average cost to the Corporation of such stock being $8.1453 per share; and

WHEREAS, such a program would have a two-fold result in that it would provide the Corporation a further opportunity to acquire Prior Preferred and Series A Preferred stock at advantageous prices in line with the Company's policy, and it would give the officers who accept the Class A stock of Investors Diversified Services, Inc. a further incentive to make successful the operations of that company in which the Corporation continues to hold a large controlling interest;

NOW, THEREFORE, BE IT

RESOLVED, that on any date on which tenders are accepted pursuant to the offer of exchange of portfolio securities for the Corporation's outstanding publicly held Prior Preferred and Series A Preferred stocks heretofore authorized, or on any date to which such exchange offer may be extended, the Corporation offer to its officers to exchange its portfolio holdings of 48,225.61 shares of Investors Diversified Services, Inc. Class A Common stock for shares of either the Corporation's Prior Preferred stock or Series A Preferred stock held by the officers, the Prior Preferred stock and Series A Preferred stock to be valued at market prices but not in excess of the prices of such stocks accepted by the Corporation pursuant to the public exchange offer this day authorized, and the Investors Diversified Services, Inc. Class A Common stock to be valued

at its market price or cost to Alleghany, whichever shall be higher. The market prices of the Alleghany Prior Preferred and Series A Preferred stocks and the Investors Diversified Services, Inc. Class A Common are to be determined on the basis of the last sale on the final exchange date, but, if no sale occurs on that date, then the market price shall be the mean between the bid and asked prices at the close of the market on that day; and be it further

RESOLVED, that any exchange of Prior Preferred or Series A Preferred stocks of Alleghany Corporation for Investors Diversified Services, Inc. Class A Common stock made by any of the officers of the Corporation pursuant to the foregoing resolution shall be subject to ratification by the Common stockholders of this Corporation at the Annual Meeting of Stockholders on May 3, 1950; and be it further

[fol. 1494-c] RESOLVED, that the Chairman of the Board or the Vice Chairman or the President or any Vice President of the Corporation is authorized to accept or reject tenders of the Corporation's Preferred stocks made by any of the officers of this Corporation submitted in accordance with these resolutions; to make delivery of Investors Diversified Services, Inc. Class A Common stock required to satisfy any such tenders accepted; and to execute and deliver in the name and on behalf of the Corporation all other documents and to do any and all things which may be deemed necessary, proper, desirable or convenient to carry out the intent of the foregoing resolutions.

On January 20, 1950 the Corporation accepted tenders of Preferred stocks offered, pursuant to the foregoing resolutions, and subject to ratification or rejection by the common stockholders as therein provided, from officers of the Corporation as follows:

Mr. Allan P. Kirby, a director and President of the Corporation, tendered 2,420 shares of the Corpora-

tion's Preferred stock, Series A, for $196,020.00, or $81 per share, the market value of said shares on January 20, 1950, in exchange for 24,062 shares Investors Diversified Services, Inc. Class A Common stock valued at $195,992.21, or $8.1453 per share, the average cost of said Class A common stock to the Corporation, and cash of $27.79. The market price of the Corporation's Preferred stock, Series A on March 31, 1950 was $70 per share; the market on March 31, 1950 of the Class A common stock of Investors Diversified Services, Inc was $9 bid, $9.75 asked per share. Mr. Kirby advises the shares so tendered were not acquired by him within two years prior to the transaction.

Mr. Robert R. Young, a director and Chairman of the Board of Directors of the Corporation, tendered 2,420 shares of the Corporation's Preferred stock, Series A, for $196,020.00, or $81 per share, the market value of said shares on January 20, 1950, in exchange for 24,063 shares Investors Diversified Services, Inc. Class A common stock valued at $196,000.35, or $8.1453 per share, the average cost of said Class A common stock to the Corporation, and cash of $19.65. The market price of the Corporation's Preferred stock, Series A, on March 31, 1950 was $70 per share; the market on March 31, 1950 of the Class A common stock of Investors Diversified Services, Inc. was $9 bid, $9.75 asked per share. Mr. Young advises the shares so tendered were not acquired by him within two years prior to the transaction.

Mr. J. J. Anzalone, a director, a Vice President and Secretary of the Corporation, tendered 10 shares of the Corporation's Prior Preferred stock for $817.50, or $81.75 per share, the market value of said shares on January 20, 1950, in exchange for 100 shares of Investors Diversified Services, Inc. Class A common stock valued at $814.53, or $8.1453 per share, the average cost of said Class A common stock to the Corporation, and $2.97 in cash. The market on March 31, 1950 of the Corporation's Prior Preferred stock was $78 bid, $81 asked per share; the market on March 31, 1950

of the Class A common stock of Investors Diversified Services, Inc. was $9 bid, $9.75 asked per share. Mr. Anzalone advises that the shares so tendered were [fol. 1494-d] not acquired by him within two years prior to the transaction.

Messrs. Kirby, Young and Anzalone have assured the Corporation that the shares of Class A common stock of Investors Diversified Services, Inc., to be acquired by them pursuant to such exchanges, are being acquired solely for investment.

The Corporation is of the opinion that the foregoing transactions provide a further opportunity for the Corporation to acquire Preferred and Prior Preferred stocks at advantageous prices in line with the Corporation's policy. Mr. Anzalone is presently a director of Investors Diversified Services, Inc. Although neither Mr. Kirby nor Mr. Young is an officer or director of that company, both of them in their capacities as officers and directors of Alleghany Corporation, which controls Investors Diversified Services, Inc. and directs its policies, contribute greatly, because of their experience and skill in such matters, in the management of that company, devoting a substantial amount of their time to such activities. It is expected that they will have further incentive, through ownership of Investors Diversified Services, Inc. stock, to make successful the operations of that Corporation in which Alleghany holds a large controlling interest.

While a matter of such a nature is not required by the Corporation's Certificate of Incorporation or By-Laws to be submitted to the stockholders, the Board of Directors believed that, inasmuch as these transactions involved dealings with the principal officers of the Corporation, it was desirable and proper that the transactions be consummated only if the holders of a majority of the Corporation's common stock approved, and therefore directed that the matter be submitted to the common stockholders for ratification or rejection.

Messrs. Allan P. Kirby and J. J. Anzalone, who also own common stock of the Corporation, have advised the Corpo-

ration that the shares of common stock held by them will not be voted either for ratification or rejection of the transactions involving exchanges by officers of the Corporation of Preferred stocks for Class A common stock of Investors Diversified Services, Inc. The proxies, exclusive of proxies which may be tendered by Messrs. Allan P. Kirby and J. J. Anzalone, will be voted in favor of ratification, unless the stockholder specifies otherwise, in which case, the shares represented by any such proxy will be voted in accordance with the specifications made by such proxy. If the holders of a majority of the shares of common stock, other than Messrs. Kirby and Anzalone, voting on such matter, vote in favor of ratification of the transactions, they will be finally consummated; otherwise the transactions will not be consummated. The general effect of ratification of these transactions would be that the Corporation would acquire 10 shares of its Prior Preferred stock having a market value on January 20, 1950 (the date of tender, of $817.50, or $81.75 per share, and 4,840 shares of its Preferred stock, Series A, having a market value on the same date of $392,040, or $81 per share, and in exchange therefore would dispose of 48,225 shares of Class A common stock of Investors Diversified Services, Inc. having a cost basis to the Corporation of $392,807.09, or $8.1453 per share, and cash in the amount of $50.41. The market price on March 31, 1950 of the Corporation's Prior Preferred stock was $78 bid, $81 asked per share and [fol. 1494-e] for the Preferred stock, Series A, the market price on the same date was $70 per share; the market on March 31, 1950 of the Class A common stock of Investors Diversified Services, Inc. was $9 bid, $9.75 asked per share.

* * * * * *

By order of the Board of Directors.

ALLEGHANY CORPORATION

By J. J. ANZALONE
Secretary

April 6, 1950

[fol. 1495]

IN THE UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT No. 35

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Index No. .....

Civil Action No. 92-205

SADIE ZENN, *et al.*,

Plaintiffs,

against

J. J. ANZALONE, *et al.*,

Defendants.

IT IS HEREBY STIPULATED AND CONSENTED THAT DONOVAN LEISURE NEWTON & IRVINE, Esqs., of No. 2 Wall Street, New York 5, New York, be and hereby are substituted in place and stead of LORD DAY & LORD as attorneys for the Defendant ALLAN P. KIRBY in the above entitled action and that this substitution be entered into effect without further notice.

/s/ ALLAN P. KIRBY
LORD, DAY & LORD

Consent must be signed by attorney of record
and signed and acknowledged by party.

STATE OF NEW YORK,)
) *ss.*:
COUNTY OF NEW YORK)

On the 17th day of December, 1959, before me personally came ALLAN P. KIRBY to me known, and known to me to be

the same person described in and who executed the foregoing consent and acknowledged to me that he executed the same.

/s/ ANNE L. JOOST
Anne L. Joost
Notary Public, State of New York
No. 41-2000250
Qualified in Queens County
Commission Expires March 30, 1961

976-977

[fol. 1496]

ALLEGHANY CORPORATION
230 PARK AVENUE
NEW YORK 17, NEW YORK

17 DEHART STREET,
MORRISTOWN, NEW JERSEY,
NOVEMBER 2, 1959

ALLAN P. KIRBY
CHAIRMAN OF THE BOARD

MRS. ROBERT R. YOUNG,
"FAIRHOLME",
RUGGLES AVENUE,
NEWPORT, RHODE ISLAND.

DEAR MRS. YOUNG:

WHEN YOU HAVE READ THE ENCLOSED LETTER, YOU MAY POSSIBLY MORE FULLY REALIZE HOW IMPORTANT IT IS TO YOU AND TO ME THAT THERE SHOULD NOT BE THE SLIGHTEST INDICATION OF DISHARMONY IN OUR RANKS AND THAT ABSOLUTELY NOTHING SHOULD BE DONE AT THIS TIME TO INDICATE ANYTHING LIKE THAT.

SINCERELY YOURS,

Allan P. Kirby

APK.O

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[fol. 1497]

IN THE UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT NO. 41

LORD, DAY & LORD
25 BROADWAY
NEW YORK 4

Digby 4-8480
CABLE ADDRESS
LORDATTY, NEW YORK

October 22, 1959

Mr. Allan P. Kirby
17 DeHart Street
Morristown, New Jersey

Dear Mr. Kirby:

This is in reply to your letter of October 12th posing seven questions regarding Breswick v. Briggs and related litigation. My answers are numbered to correspond to your questions:

1. If the causes of action alleged by the Phillips group were upheld after trial, the plaintiffs would, we believe, ask the Court to impose upon you a liability of approximately $8,000,000 with respect to your own participation in various transactions relating to New York Central stock.

In addition, they would no doubt seek to impose upon you joint liability for profits made by others of the defendants in connection with the alleged conspiracy. While it is likely that such liability would ultimately be borne by the other defendants directly concerned, this is not necessarily so, and the plaintiffs would probably be free to collect at their option from you. These liabilities include a possible $3,000,000 liability on Mr. Young's investment in Central; approximately $4,600,000 in profits to Richardson, Carter and the Murchisons on their investment in Central; plus $55,600,000, being the cash equivalent of the gain to

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Alleghany if the sales of IDS stock to the Murchisons and Carter in the period 1953-1955 were rescinded; plus profits in an unascertained amount made by Chesapeake Industries, Inc. on various investments which allegedly should have gone to Alleghany; plus profits in an unascertained amount made by Mr. Young and others on the Edmonton, Canada, Shopping Center, which allegedly also should have gone to Alleghany.

Mention should also be made of the 1950 transaction in which you and Mr. Young, along with Messrs. Purcell and Anzalone, exchanged Alleghany preferred stocks for non-voting IDS stock. While this claim is not alleged by the Phillips group, it is covered by the proposed settlement; and if the settlement collapses, this claim would have to be tried. Rescission of your own portion of this transaction would mean a loss to you of approximately $22,800,000; liability with respect to the participation of the others, for which you would be jointly liable if the alleged conspiracy were proven, is approximately $39,350,000 (the cash equivalent of rescission).

The foregoing figures are in many instances based on current market prices (or the highest price in the period since the transaction) and could therefore be even higher as a result of market developments between now and the time any judgment might be rendered. Furthermore, while the foregoing figures are based on extremely pessimistic assumptions as to the relief which would be granted, in addition to the basic pessimistic assumption that liability would be established as to all claims, some claims asserted against you have seemed so extremely remote or relatively small that they have not been included in our computations.

2. The latest formal settlement proposal of the Phillips group is the proposal which Mr. Brussel conveyed to me on July 10, 1956. Under it, the defendants

[fol. 1499]

would transfer to Alleghany 500,000 shares of New York Central stock and $1,000,000 in cash. In return, the defendants would receive shares of a new Alleghany preferred stock equal in value to the 500,000 shares of Central stock surrendered. This would be a 3% non-cumulative preferred and would be non-convertible and non-callable for ten years, being convertible thereafter to Alleghany common. The defendants would be required to pay any capital gains tax which might be due as a result of the exchange of stock. In addition, the Murchisons would return control of IDS (Brussel has since indicated that this contemplates return of more than the 130,000 voting shares exchanged in April of 1952), and the power to vote and sell these shares would be vested in a group of trustees, Alleghany naming one, the Phillips group naming another, and these two selecting a third.

3. While in the strictest technical sense, neither the findings of the court in Phillips' Washington proceeding nor the evidence introduced there will be binding upon or admissible against the defendants in the New York derivative actions, success by Phillips in Washington could and probably would have a serious adverse effect upon the New York litigation. Surely any adverse findings there would tend to increase any settlement demands made here. Any relief granted there which led the ICC to take action against Alleghany, particularly the unlikely but possible granting of retroactive relief, might bear upon our position in New York. Likewise, evidence given in Washington could be used in various ways in New York--for example, by pinning down or contradicting any witness testifying in New York who had also testified in Washington, or by asking people to admit the genuineness of documents obtained through the processes of the Washington court. I should perhaps add that even if the New York settlement has been consummated, any evidence or findings obtained in the Washington case showing fraud or perjury in obtaining approval of the New York settlement would furnish grounds for a petition to reopen the settlement proceedings.

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[fol. 1500]

As you know, a derivative stockholders action was brought by a stockholder of the Chesapeake & Ohio Railway Company in which you and Alleghany Corporation are named as defendants. This suit seeks to compel Alleghany to return to the C & O the 800,000 shares of New York Central stock formerly owned by it and which were purchased by the Murchison group. An adverse decision in the Washington action would also have serious repercussions here.

4. There is in my opinion only a remote possibility that Alleghany might be compelled to divest itself of control of Central as a result of either the Washington or the New York proceedings. To put the matter in its broadest terms, any charges that might be made or even established against the ICC or Alleghany's management would hardly seem an appropriate reason for penalizing Alleghany's stockholders. Divestiture of control would be such a penalty. I do not believe that anyone could seriously argue that Alleghany's control of Central has been harmful to the other stockholders of Central. Moreover, the principal thrust of the New York derivative litigation has been the argument that Alleghany should have bought more Central stock and should have bought it sooner, rather than that Alleghany should not have taken control of Central.

Nevertheless, strictly speaking, the Supreme Court has sustained only Alleghany's actions and regulatory status since taking control of Central; no adjudication has been had on the alleged need to obtain ICC approval for acquisition of control of Central; and the three-judge court at one point suggested that if the acquisition of control were ultimately found to have been improper (as it thought), one possible remedy would be divestiture. Thus this threat cannot be regarded as completely removed from the situation.

5. The complaint in the Phillips group's derivative action in the federal court still contains a request that a receiver be appointed to manage the affairs of Alleghany. Knowing what we know at this time leads us to believe that there is no probability of the court appointing a receiver.

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[fol. 1501]

6. There cannot be any substantial assurance as to how long the New York derivative litigation will continue. It is my opinion, and the consensus of opinion among counsel for the parties supporting the proposed settlement, that the tide is with us and that we will probably get favorable action from the Master following the forthcoming hearings, and from Judge Dimock thereafter. Six to nine months should be enough time for these developments to come to fruition. If success is achieved in these next two steps, along with such companion action as may be appropriate in the state court, the state court would enter a final judgment dismissing the action. The Phillips group would then face a decision as to whether to invest the time and money which would be entailed in appeals. The chances of their success on such appeals would be very slim, although in a litigation which has already produced so many surprises they cannot be discounted entirely. The Phillips group might decide to file appeals and delay prosecuting them as long as possible, while pursuing the Washington action in the hope that the evidence or decision there would furnish grounds for reopening the New York settlement proceeding. Against the possible advantages to them of appealing, they would have to weigh the fact that counsel fees are usually not awarded until final consummation of the settlement, which would await the outcome of the appeals. The already great delay in making fee awards may be a factor of importance in their thinking.

7. I am afraid that I cannot give you an estimated outside figure on legal expenses that would be of any real assistance to you. The "most unfavorable estimate of the time required to conclude the New York case" would, I suppose, involve judicial rejection of the settlement after lengthy appeals, further settlement negotiations and further court rejection, trial, reversal of the action after appeals, retrials, and so on into an almost endless chamber of unlikely horrors.

I think as a practical matter the past experience in this litigation regarding our fees gives you a useful guide to the general magnitude of the legal expenses likely to be incurred in the future. If the

[fol. 1502]

case is tried, i.e., if the settlement collapses - the trial would probably last a very long time and there would be in addition the inevitable lengthy and intensive preparations for trial. Very high legal expenses would be incurred during such period, running at a rate roughly comparable to the charges in the most intensive period of state court hearings before the Referee. If there is only a relatively short further hearing before Master Fitzsimmons and then some brief writing and a series of lawyers' arguments before Judges Dimock and McGivern and appeals from favorable decisions by them, the expenses would, of course, be very much less and would run at rates comparableto those which have prevailed since roughly the fall of 1956. The foregoing is the most helpful answer I can give with regard to this most uncertain subject.

In accordance with our telephone conversation of today, I shall call you on Monday afternoon in the hope that we might meet on Tuesday morning to more fully discuss the contents of this letter.

Sincerely yours,

Thomas Riley

TFD:mg

1- Plaintiffs
2- IDS (Ingram)
3- Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRISWICK & CO., et al.,

Plaintiffs,

v. CIVIL ACTION NO. 98-371

O. HENRY BRIGGS, et al. STIPULATION

Defendants.

STIPULATION OF SETTLEMENT BETWEEN PLAINTIFFS AND DEFENDANT ALLAN P. KIRBY

WHEREAS, on July 25, 1955, the parties in Kirby, et al. v. J.J. Anzalone, et al., pending in the Supreme Court of the State of New York, New York County, Index No. 7444/1954, agreed in settlement of that action that the individual defendants therein would pay to Alleghany Corporation the sum of $700,000.00 and other considerations, and

WHEREAS, by order entered herein on October 27, 1955 this District Court enjoined the defendants in this Civil Action No. 98-371 from pleading as a defense herein any judgment resulting from the proposed settlement in the aforesaid Kirby v. Anzalone action, and [fol. 1503]

WHEREAS, on June 22, 1956 defendants Murchison Brothers agreed in settlement of this District Court action to deliver to Alleghany Corporation 130,000 shares of the voting stock of Investors Diversified Services, Inc., in exchange for 130,000 shares of the Class A non-voting stock of said Investors Diversified Services, Inc., and

WHEREAS, on July 17, 1958, the individual defendants herein also agreed as part of the settlement of this District

IN THE UNITED STATES DISTRICT COURT
PLAINTIFFS' EXHIBIT No. 69A

Court action to pay to Allegheny Corporation the sum of $900,000.00 in addition to the cash and other considerations above-mentioned in the agreements dated July 25, 1955 and June 22, 1956; and

WHEREAS, by opinion filed on March 12, 1959 the Supreme Court of the State of New York approved the settlement represented by the aforesaid offers of July 25, 1955, June 22, 1956 and July 17, 1958; but stated that until an order has been entered in this District Court action vacating the aforesaid injunctive order of October 27, 1955, no order based upon such State Supreme Court approval may be entered, provided that upon proof by affidavit of such vacation, an order based upon such State Supreme Court approval may then be settled on notice in said Zenn v. Anzalone action; and

WHEREAS, on November 17, 1958, a Special Master appointed by this District Court made a report to this District Court recommending that by reason of the negotiations culminating in the aforesaid offers and by reason of other events since October 27, 1955 this District Court vacate its injunctive order of October 27, 1955; and

WHEREAS, by decision and order dated September 22, 1959, this District Court rejected, ~~with~~ upon plaintiffs' request, the aforesaid report of the Special Master and remitted to him for further hearings the question of the settlement value of the claims and causes of actions [in both the District Court and State Supreme Court actions] and ~~its~~ relation to the value of the aforesaid additional offers of June 22, 1956 and July 17, 1958; and

WHEREAS, said Special Master, pursuant to the aforesaid decision and order of September 22, 1955, has tentatively set

[fol. 1504]

February 1, 1960 for the beginning of said hearings; and

WHEREAS, defendant Allan P. Kirby ~~is desirous~~ desires; for the purpose of avoiding the time and expense of further burdensome litigation, ~~the continuation of which, in the opinion of the director defendants, will not be in the best interests of Allegheny Corporation;~~ to settle and compromise the claims alleged in the complaint; and

WHEREAS, the undersigned plaintiffs are likewise desirous to settle and compromise the claims alleged in the complaint and amended complaint;

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned as follows:

1. This stipulation and the offer and agreement of settlement contained herein are specifically conditioned upon

(a) Vacation and elimination as to defendant Kirby of the prohibiting provisions of the aforesaid order entered herein on October 27, 1955, and

(b) Judicial approval by the State Supreme Court in the Zern v. Anzalone action of this stipulation and offer and agreement of settlement.

Unless both such vacation and such approval are effected and obtained on or before December 24, 1959 (or such later date as defendant Kirby may select), then this stipulation and the offer and agreement of settlement contained herein shall be and become null and void and of no further force and effect.

2. Plaintiffs and Rosen and Phillips jointly and severally agree to use their best efforts to assist defendant Kirby in effecting and obtaining such vacation and judicial approval on or before December 24, 1959.

3. Neither this stipulation nor any proceedings there-

under shall be construed or deemed to be evidence, or an admission on the part of defendant Allan P. Kirby, of any liability or wrongdoing whatsoever; nor shall they be offered in evidence as such.

4. Defendant Kirby hereby confirms the above mentioned agreements and offers of settlement dated July 25, 1955, June 22, 1956 and July 17, 1958, and agrees to carry out his obligations thereunder to the best of his ability.

5. Subject to judicial approval and confirmation on or before December 24, 1959 by the State Supreme Court in said Zonn v. Anzalone action, and subject to the vacation as to defendant Kirby on or before December 24, 1959 of the prohibitory provisions of the order entered herein on October 27, 1955, all claims and causes of action asserted on behalf of Alleghany Corporation against defendant Kirby in this District Court action and/or in said Zonn v. Anzalone State Supreme Court action shall be compromised, settled and discharged by defendant Kirby's performance of his obligations under said agreements and offers of settlement dated July 25, 1955, June 22, 1956 and July 17, 1958 plus on or before December 31, 1959, the payment by defendant Kirby to Alleghany Corporation, of an additional sum of $1,100,000, in return for all of which Alleghaby Corporation shall execute and deliver to defendant Kirby a judicially approved release of all said claims and causes of action, said release to be in a form sufficient and effective to cut off as against defendant Kirby all rights of contribution that might be asserted by anyone with respect to said claims and causes of action. [fol. 1506]

6. In consideration of the foregoing agreement of defendant Kirby, plaintiffs and Rosen and Phillips agree that they will interpose no objection to any application hereinafter

made in this District Court by defendant Kirby for a vacation of the said order entered herein on October 27, 1955 insofar as said order prohibits defendant Kirby from pleading as a defense herein any judgment resulting from a settlement approved by the State Supreme Court in said Penn v. Angelone action; provided that this District Court shall expressly provide in any order it may enter upon said application that all the claims and rights of plaintiffs as against all defendants herein other than Allan P. Kirby are reserved, and none of said claims or rights are released.

7. Plaintiffs and Samuel L. Rosen and Phillips further agree they will make no objection to the entry of a judgment by the Supreme Court of the State of New York in Penn v. Angelone, Index No. 7244/1954, directing the payments by defendant Allan P. Kirby as herein provided and dismissing the complaints in said action as to the said Allan P. Kirby and providing for a general release by Alleghany Corporation to defendant Allan P. Kirby, provided that such judgment shall expressly provide that all the claims and rights of plaintiffs as against all defendants herein other than Allan P. Kirby are reserved, and none of said claims or rights are released.

8. In the event judgment is recovered upon any cause of action or claim as to which defendant Allan P. Kirby is jointly liable with one or more other defendants, the amount of the judgment on said cause of action or claim shall be reduced by the pro portionate share thereof which defendant Allan P. Kirby would have been required to pay had he not entered into this stipulation of settlement, and had all other defendants jointly liable for the judgment on said cause of action or claim paid their respective proportionate shares of such judgment in full;

[fol. 1507]

the object and intent of this provision being (a) that the defendants herein not entering into this stipulation of settlement, and whose liability upon any cause of action or claim is joint with defendant Allan P. Kirby shall not, by reason of this stipulation of settlement be required to pay more than the amount of such liability which they would otherwise have had to pay but for this stipulation of settlement and (b) that defendant Allan P. Kirby shall not hereafter be liable to any co-defendant, for contribution with respect to any cause of action or claim included in this settlement.

9. Defendant Kirby agrees that he will use his best efforts to obtain the payment by the other defendants herein and in the Supreme Court of the State of New York of their prior agreed share of said cash offers and agreements to Alleghany Corporation.

10. Defendant Kirby will assist and cooperate with plaintiff's counsel in making available pertinent and relevant documents and other evidentiary material.

11. [provision as to IDS control and investment - see Phillips par. 8]

12. A judgment of approval made and entered by the State Supreme Court in Zonn v. Anselone action shall be reversed on appeal or if any pending action involving said claims and causes of action defendant Kirby shall be now or hereafter prohibited from pleading a judgment of approval by the State Supreme Court in said Zonn v. Anselone action as a defense to such other action, then and in either of these events this stipulation of settlement shall be and become null and void and of no further force and effect.

Dated: New York, N.Y.
December 1959.

[fol. 1508]

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[fol. 1509]

Rosston, Nort & Brussel
By George Brussel, Jr.
Attorneys for Plaintiffs

Grauberd & Moskovits
By Seymour Grauberd
Attorneys for Samuel L. Rosen

Randolph Phillips
Consultant to Plaintiffs' Attorneys

Donovan Leisure Newton & Irvine
By David Feitelbaum
Attorneys for defendant Allan P. Kirl

SATTERLEE, WARFIELD & STEPHENS
460 PARK AVENUE
NEW YORK 22, N.Y.

ETHELBERT WARFIELD
J. FEARON BROWN
MURRAY MACELHINNEY
WILLIAM C. SCOTT
F. W. H. ADAMS
JAMES F. DWYER
PAUL EDGAR SWARTZ
ROBERT H. SCHNELL
WM. E. STOCKHAUSEN
JAMES H. NICHOLS
DONALD W. SMITH
FRANCIS D. KALOSKY

DAVID ASCH
COUNSEL

TELEPHONE
PLAZA 1-0000

CABLE ADDRESS
"SATERFIELD" NEW YORK

130 A

December 23, 1959

Lord, Day & Lord, Esqs.
25 Broadway
New York 4, New York

Attention: Thomas F. Daly, Esq.

Re: Sadie Zenn, et al v. J. J. Anzalone, et al

Gentlemen:

Our clients below named have elected to cancel the stipulation of settlement, dated June 25, 1955, in the above entitled action, as heretofore amended and supplemented, and in accordance with its terms have instructed us to authorize and demand that you give notice forthwith to such effect in writing on behalf of our said clients to Pomerantz, Levy & Haudek, Esqs. on behalf of the plaintiffs in the above entitled action.

Kindly acknowledge receipt of this letter by signing and returning the enclosed carbon copy to the bearer hereof.

Yours very truly,

SATTERLEE, WARFIELD & STEPHENS

By _____

On behalf of Clint W. Murchison and John Dabney Murchison and Clint W. Murchison, Jr., individually and as partners doing business under the firm name of Murchison Brothers.

cc: Pomerantz, Levy & Haudek, Esqs.

1510

[fol. 1510]

IN THE UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT No. 84

991

[fol. 1511]
IN THE UNITED STATES DISTRICT COURT
PLAINTIFFS' EXHIBIT No. 102

Dear Bill -

The attached memorandum concerning my general status was prepared before I learned of your illness. You may care to study it after you are feeling better. While it contains little material that you are not already familiar with, it did serve for me the purpose of pulling together some of our thoughts and conversations, and may, depending on your judgment, be helpful in any discussions you may have with APK.

Best Wishes.

Chick

copy to APK 9/27/59

copy to APK 9/27/59

MEMORANDUM

I very much appreciated my meeting with you at your office about four weeks ago when we discussed various possibilities that might be open to me, and over the relative calm of my intervening vacation period I have attempted to clarify and supplement my own thinking about some of the contingencies considered:

1. Chairman of the Board of Central

As reported in an earlier memorandum, R. M. Moss advanced this idea to me on May 28, the day of our Central Annual Meeting. While I have no doubt I could fill the job with initial satisfaction and steadily increasing effectiveness, I agree with you that for the reasons we discussed I should not aspire to this position. I think we both agree, however, that perhaps the quickest and least painful solution to the Perlman problem (and, therefore, the Central problem) is the appointment of a full time effective Chairman - whoever he may be - with duties of the general nature you outlined to me.

2. Vice Chairman of Central

We touched on this possibility, and it is one which would be attractive to me primarily if you were in a position to serve as Chairman. I recognize and highly respect your contention that the post calls for a man with very many years of active business life ahead of him, but I think that remarkable progress could be achieved in a few number of years with the right man in authority.

In the United States District Court
Plaintiffs' Exhibit No. 103

3. A Return to Alleghany.

As I believe you realize, my primary desire is to return to Alleghany. My move to Central in 1954 as Secretary was a kind of emergency arrangement in that RRY felt he had to have someone in the post he could trust, and I have always hoped the day would come when a recall would be feasible and desirable since Alleghany is truly my first interest. Certainly one of the ironies of my career to date lies in the present comparative status of myself and Dave Wallace: it seems obvious that, when in 1954 RRY asked me to select a successor for myself in Alleghany (RRY, incidentally, never met Wallace until after his appointment), it was never contemplated by RRY that DWW should then or later be entrusted with highest level responsibilities while I continued to struggle in the Central morass. While I definitely have nothing against Dave personally, I am approximately five years older and should be able to bring to the daily resident supervision of Alleghany affairs a higher degree of maturity, discretion, and judgment than he is able - perhaps understandably - to muster.

As you know I served in Alleghany from early 1951 until late 1954 and since that time I have kept a close knowledgeability of its affairs including, particularly, the law suit front whose various important causes of actions arose during my period in Alleghany, whose army of attorneys and protagonists are well known to me, and where I have steadily over the years continued to study virtually all ensuing briefs and decisions involved. (It is not generally known that for years RRY had me - most unofficially - maintain contact with Randolph Phillips with a view to settlement

[fol. 1513]

1513

994

possibilities
~~possibility~~). Furthermore, while the legally significant phases of the struggle may be nearing an end (it is tragically regrettable they ever began since they could rather easily have been avoided) it seems to me that Alleghany is not immune to subsequent organized shareowner opposition -- opposition that could be fed by publicity emanating directly or indirectly from the latest Phillips thrust (which I doubt he regards as a serious legal weapon). Under such circumstances my return to Alleghany would be, I think, peculiarly propitious since (a) I have a personal knowledge of the substance of most of Phillips' latest allegations; and (b) given one major proxy fight and five years experience in charge of all aspects of Central's shareowner relations program I think my credentials in this frequently delicate and intricate field are unassailable. Obviously, after the years that have been spent in building up IDS and acquiring Central, it would be tragically ironic if Alleghany were not in the strongest position personnel-wise to meet any potential opposition - legal or otherwise.

I recognize there are problems attendant upon my return to Alleghany including the matter of my successor as Secretary of Central. However, there is no doubt in my mind that either Cliff Ramsdell, whom you know, or Bob Carroll, my present Senior Assistant, who has been so helpful could do an entirely adequate job - and the loyalty of each is beyond question. Nonetheless, should there be any reservation about both of them, may I suggest that, if APK were to want me back in Alleghany, I could still, it seems to me, remain in Central as Secretary to the Board of Directors

[fol. 1514]

(not the Corporate Secretary) with duties confined to Central Board affairs including perhaps the staging of the Annual Meeting. The latter duties are not time consuming but are delicate in nature; the day to day duties of the Corporate Secretary are time consumming but either Ramsdell or Carroll can easily handle them. And it is true that there are some advantages to my retaining some Central connection.

****

At our meeting I also reported to you that, while I think my loyalty to APK and Alleghany over at least the past five years is so transparently obvious as not to require comment, it is a loyalty I have been able to pursue only at the substantial expense of what, naturally, should be a still higher devotion i.e. to my family. As you so sympathetically understood, the past five years have been truly enervating from both a financial and emotional point of view. For example, all experts on management would agree that a normal salary for my present post in Central would be in the neighborhood of $35,000., and yet for five years circumstances have prevented my even coming close to this figure which must mean, in effect, of course, that even after taxes I have lost thousands of dollars justly earned. Even worse, the psychological punishment of the general uncertainty of my situation now that I am at an age where at least the outline of a future should be reasonably clear has reached a proportion I cannot for much longer handle on the basis of pure stamina.

All in all, therefore, I know you will understand why it

[fol. 1515]

seems to me that a decision, either affirmative or negative, about my general status should be made in the forseeable future since my personal responsibilities simply cannot in good conscience be permanently neglected. I naturally hope that such a decision will be affirmative in nature and will concern Alleghany since, among other reasons, it will afford opportunity for the continuance and expansion of my valued relationship with APK and with you. The latter has grown up only in recent years, but it is one which I have come to enjoy and prize highly in the course of the tremendous amount of time you have spent in the badly-needed study of Central affairs.

X Y Z

MEMORANDUM

Since Alleghany has spent 3-1/2 million dollars in legal fees by inconclusively defending causes directly or indirectly emanating from Randolph Phillips and since a new legal chapter is about to open concerning the gravity of which there appears to be profound differences of opinion, I would suggest that APK -for his own protection- request a signed memorandum from Lord, Day and Lord and David Wallace setting forth their answers to the following questions:

1. If the Phillips' causes of action go to trial and are lost by defendants, what is the maximum liability of APK?

2. What does the record in the case show to be the latest official settlement demands of the Phillips group?

3. What will be the effect on Alleghany and APK if the allegations in the Phillips suit against the I.C.C. (the "Washington" case) are sustained in whole or in part and will the evidence introduced in the Washington case be generally admissible in the New York case before the Referee?

4. Is there any substantial danger of Alleghany's control of Central being divested or otherwise affected by the two suits?

5. Is Phillips still formally requesting a receivership for Alleghany on the grounds of mismanagement?

6. Is there any reasonably forseeable end to the New York case keeping in mind the possible eventual rejection of any settlement by Judge Dimock, the resulting necessity of trial of the issues, and the probability of a series of appeals? Between the time the case first appeared before the Referee and Judge Dimock's decision of last week four years have expired. Can there be any substantial assurance it will not take at least as long to finally conclude the case?

7. Under the most unfavorable estimate of the time required to conclude the New York case what would be the approximate legal expenses involved?

The undersigned members of the Executive Committee of the Board of Directors of Alleghany Corporation do hereby adopt the following resolution:

RESOLVED that this Executive Committee does hereby approve the stipulation of settlement attached hereto and authorizes Charles Ireland to execute and deliver such stipulation on behalf of the Corporation and to take such action as may be necessary or appropriate to carry out such stipulation.

New York, N. Y.

December 22, 1959.

William E. Eppler

Fred Kirby

William G. Rabe

[fol. 1518a] CLERK'S NOTE

Attachment—"Supplemental Stipulation of Settlement in Zenn v. Anzalone, Sup. Ct. N. Y. Co. Index No. 7244/1954" is omitted from the record here. It is printed as a part of Plaintiffs' Exhibit No. 29 folio 1363 *supra*.

[fol. 1519]

IN THE UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT No. 147

MINUTES OF MEETING OF THE BOARD OF DIRECTORS

OF

ALLEGHANY CORPORATION

New York, N. Y.
December 29, 1959

Pursuant to notice duly given in accordance with the By-Laws of the Corporation, a meeting of the Board of Directors of Alleghany Corporation was held on the 32nd Floor of 230 Park Avenue, New York, New York at 2:00 P. M., Eastern Standard Time, on Tuesday, December 29, 1959.

The following directors were present:

William E. Eppler	Allan P. Kirby
Joseph M. Fitzsimmons	Fred M. Kirby
Charles T. Hill	Anthony A. Smith

constituting a quorum.

Mr. Allan P. Kirby, Chairman, presided and Mr. Charles T. Ireland, Jr., who was present by invitation, was duly appointed Secretary of the meeting.

Upon motion duly made and seconded, the minutes of the Board of Directors meeting of July 22, 1959 were unanimously approved.

Upon motion duly made and seconded, the minutes of the meeting of the Executive Committee of November 13, 1959 were unanimously approved, and all actions taken at said meeting were also duly and unanimously confirmed.

The resignation of Mr. David W. Wallace as a director and a member of the Executive Committee was accepted, effective December 1, 1959.

Mr. Ireland thereupon left the room and Chairman Kirby acted as temporary Secretary of the meeting.

After discussion and upon motion duly made and seconded, Mr. Ireland was unanimously elected a director of the Corporation to represent the Common shareowners, [fol. 1520] and a member of the Executive Committee of the Board of Directors.

After discussion the Board unanimously confirmed the recent action of the Chairman of the Board in appointing Charles T. Ireland, Jr., Counsel to the Corporation.

After discussion the Board duly and unanimously voted that Mr. Charles T. Ireland, Jr., Counsel to the Corporation, be placed on a $10,000 per year retainer for the years 1959, 1960 and 1961.

Mr. Ireland thereupon re-entered the meeting and resumed his duties as Secretary of the meeting.

There followed a discussion concerning the possible calling of this Corporation's $4 Prior Preferred stock, and it was decided to take no action at this time.

After discussion and upon motion duly made and seconded, the following preamble and resolutions were unanimously adopted:

WHEREAS, this Board of Directors at a meeting held on July 22, 1959, took certain action with respect to the making of a new proposed collateral Bank Loan in the amount of $15,000,000 which would refund the existing loan in the same principal amount; and

WHEREAS, negotiations have now made it possible for the Corporation to borrow said sum on a non-secured basis without any increase in the proposed rate of interest;

NOW, THEREFORE, BE IT

RESOLVED, that the Corporation borrow the aggregate principal sum of $15,000,000 from the following group of banks in the amounts following their respective names:

Name of Bank	*Amount*	%
Chemical Bank New York Trust Company	$8,500,000	56⅔
Fidelity-Philadelphia Trust Company	3,000,000	20
Irving Trust Company	1,000,000	6⅔
The Marine Midland Trust Company of New York	1,000,000	6⅔
Empire Trust Company	1,000,000	6⅔
Central National Bank of Cleveland	500,000	3⅓

the loan to mature on June 30, 1969, to bear interest, payable quarterly, at a rate equal to 5% per annum, all in accordance with and as more fully set forth in a proposed Loan Agreement, a proof of which, dated December 22, 1959, was presented at this meeting, and is directed to be attached [fol. 1521] to the minutes as "Exhibit A", and incorporated therein by this reference; and further

RESOLVED, that the President or Executive Vice President of the Corporation be and each of them hereby is authorized and directed to enter into on behalf of the Corporation and to execute the aforesaid proposed Loan Agreement in substantially the form presented to this meeting, with such changes therein as shall be approved by counsel and by the officer of the Corporation who shall execute the Loan Agreement on behalf of the Corporation, the execution thereof to be conclusive evidence of such approval; and further

RESOLVED, that subject to obtaining from the Interstate Commerce Commission and any other public authority having jurisdiction all requisite authorization therefor, the Executive Vice President and the Treasurer or any Assistant Treasurer of the Corporation be and they hereby are authorized and directed to execute and deliver in the name and on behalf of the Corporation, substantially in the form presented to this meeting, the promissory notes evidencing the borrowing; and further

RESOLVED, that Allan P. Kirby, Chairman of the Board and President, Charles T. Ireland, Jr., Executive Vice President; or Jared C. Horton, Treasurer of the Corporation, be and they hereby are designated as the proper officer of the Corporation to sign, verify and file in the name of and on behalf of the Corporation with the Interstate Commerce Commission or other public authorities having jurisdiction in the premises, any and all applications and petitions and amendments thereof or supplements thereto as may be required by law in order to secure all authority, orders, and certificates authorizing the Corporation to issue the promissory notes authorized by these resolutions and to execute and deliver the notes; and further

RESOLVED, that all resolutions heretofore adopted by the Board of Directors or Executive Committee of the Corporation with respect to the execution of the proposed Collateral Loan Agreement be and they hereby are revoked; and further

RESOLVED, that the officers of the Corporation be and they hereby are authorized and directed to execute any and all documents and to do any and all acts or things that they deem necessary or desirable in order to carry out the intent of the foregoing resolutions.

The Chairman then referred to a certain request by Mr. Randolph Phillips to inspect the stock list of the Corporation, and called attention to the fact that the Corporation had directed our transfer agent, the Chemical Bank New

York Trust Company to refuse to permit Mr. Phillips to inspect said stock list. After discussion the Board unanimously approved the action of the Corporation in sending to Chemical Bank New York Trust Company the letter dated October 28, 1959, a copy of which is attached hereto. [fol. 1522] After discussion and upon motion duly made and seconded, the Board unanimously appointed Jared C. Horton, Secretary of the Corporation.

After discussion and upon motion duly made and seconded, the Board unanimously approved the payment of the following legal bills presented to the meeting:

Lord, Day & Lord	$ 107,623.21
Donovan, Leisure, Newton, & Irvine	52,382.34
White & Case	30,748.99

After discussion and upon motion duly made and seconded the following salaries were approved for the year 1960 for the below listed offices:

Executive Vice President	$ 30,000
Secretary and Treasurer	12,000
Assistant Secretary and Assistant Treasurer	12,000

The Chairman pointed out that it was desirable that the Board approve the new form of Alleghany Corporation Stock Subscription Warrant because of the appointment of Mr. Horton as Secretary and because the Chemical Bank New York Trust Company has replaced Morgan Guaranty Trust Company as warrant agent. After discussion and upon motion duly made and seconded, the Board unanimously approved the new form of Stock Subscription Warwant of the Corporation, a form of which is attached to these minutes.

After discussion and upon motion duly made and seconded, the following resolution was unanimously adopted:

RESOLVED, that in the event hereafter of the loss or destruction of any certificate representing capital stock of

this Corporation the President or any Vice President or the Treasurer or the Secretary of this Corporation is hereby authorized to cause to be issued and delivered to or on the order of the owner of such stock and to direct the Transfer Agent to countersign and the Registrar to register a new certificate in lieu of the certificate alleged to be so lost or destroyed: (1) upon presentation by or in behalf of the owner of such stock of such evidence showing the circumstances of the loss or destruction of the certificate alleged to have been lost or destroyed and the ownership of said certificate as such officer will deem satisfactory, together with any other facts which such officer shall deem pertinent, and (2) upon presentation of a surety bond of indemnity in form and amount satisfactory to such officer, the Transfer Agent and the Registrar, executed by a surety company authorized to do business in the State of New York satisfactory and acceptable to such officer, the Transfer Agent and the Registrar, which bond of indemnity shall indemnify this Corporation, its Transfer Agent and the Registrar from and against any loss, cost or damage resulting from the issue of such new certificate.

[fol. 1523] The statement of purchases and sales of securities and supplementary financial data from July 22, 1959 through to December 28, 1959 was presented to the meeting, a copy of which is attached to these minutes and marked as "Exhibit B", and upon motion duly made, seconded and unanimously carried, said purchases and sales were approved.

The Chairman advised the Board that Mrs. Anita O'Keeffe Young had submitted her resignation as director of the Corporation, effective December 28, 1959. Upon motion duly made and seconded, the Board unanimously accepted Mrs. Young's resignation with regret.

At this point David Teitelbaum of Donovan, Leisure, Newton & Irvine was invited to the meeting to report to the Board on the settlement of the pending stockholder suit litigation. Mr. Teitelbaum reviewed for the Board in detail the recent negotiations and proceedings before the

United States District Court and the Supreme Court in New York and the terms and provisions of the stipulations and orders hereinafter referred to.

He submitted to the meeting the following:

(a) Supplemental stipulation of settlement in the consolidated action of *Zenn, et al.* v. *Anzalone, et al.*, dated December 24, 1959, between Allan P. Kirby, Alleghany Corporation, and the objectant Rosen in that action, providing for the settlement of the litigation as against Mr. Kirby on the terms therein set forth;

(b) Order of the United States District Court in the action of *Breswick* v. *Briggs*, dated December 24, 1959, vacating the injunction of that Court as to Mr. Kirby, thus making possible the consummation of the settlement with Mr. Kirby in the New York Supreme Court proceeding;

(c) Order of the New York Supreme Court in the consolidated action of *Zenn, et al.* v. *Anzalone et al.*, dated December 28, 1959, approving and confirming the supplemental stipulation of settlement with Mr. Kirby and ordering the effectuation thereof, including the issuance of a release to Mr. Kirby upon payment by him of the sum of $1,100,000 to Alleghany Corporation before December 31, 1959;

(d) Order of the United States District Court in the action of *Breswick* v. *Briggs* entered on December 24, 1959, vacating the injunction of that Court as to all other defendants, thus making possible the consummation in the New York Supreme Court of the settlement with them upon the terms and conditions of the Basic Settlement previously approved by decision of the New York Supreme Court, as supplemented by [fol. 1524] further stipulations providing for payment of an additional $900,000 by the Estate of Robert R. Young, deceased; and

(e) Order of the New York Supreme Court, dated December 29, 1959, approving and confirming such Basic Settlement with the other defendants as so supplemented, and ordering the effectuation thereof.

Mr. Teitelbaum stated that in summary, these settlements approved by the New York Supreme Court provided (i) for the payment to the Corporation of an aggregate of $3,000,000; (ii) for the return by Murchison Brothers to the Corporation of 130,000 shares of voting common stock of Investors Diversified Services, Inc. in exchange for an equal number of shares of non-voting common stock of Investors Diversified Services, Inc. to be returned to Murchison Brothers by the Corporation; and (iii) for the modification of certain joint venture agreements between Murchison Brothers and the Corporation with which the Board is familiar.

It was pointed out that the Executive Committee of the Board of Directors of the Corporation, in action taken on December 22, 1959, approved the foregoing settlement with Mr. Kirby and authorized Mr. Ireland, as its attorney, to enter into same. It was also pointed out that the settlement in regard to the other defendants had come about so rapidly and so unanticipatedly that it had not been possible to obtain Executive Committee action in respect thereof over the Christmas weekend just past.

After extensive discussion, it was on motion duly made, seconded and carried.

RESOLVED, that settlement, as regards defendant Allan P. Kirby, of the consolidated action entitled *Zenn, et al.* v. *Anzalone, et al.*, pending in the New York Supreme Court, New York County, on the terms set forth in the Supplemental Stipulation of Settlement, dated December 24, 1959, be and it hereby is ratified, approved and confirmed and the proper officers of the Corporation be and they hereby are authorized and directed to take all action necessary to effectuate such settlement, including without limitation the execution

and delivery to Allan P. Kirby of a release in the form annexed to the Supplemental Stipulation of Settlement, on payment by him to the Corporation of the sum of $1,100,000; and it is further

RESOLVED, that the settlement as regards all defendants other than Allan P. Kirby in the consolidated action entitled *Zenn, et al.* v. *Anzalone, et al.*, pending in the New York Supreme Court, New York County, on the terms set forth in the Order entered in that action on December 29, 1959 be and the same is hereby ratified, approved and confirmed, and the proper officers of the Corporation be and they hereby are authorized and directed to take such action as is necessary and appropriate to effectuate such settle-
[fol. 1525] ment, including without limitation the execution and delivery of releases to such other defendants when and as provided in said Order.

Mr. Allan P. Kirby did not vote on the above matter.

There being no further business to come before the meeting, it was upon motion duly made adjourned.

By /s/ CHARLES T. IRELAND, JR.
Charles T. Ireland, Jr.
Secretary
of the Meeting

[fol. 1526]

IN THE UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT No. 191

CERTIFICATE

The undersigned, Bernard C. McGuire, Assistant Secretary of Alleghany Corporation, does hereby certify that he has access to the books and records of Alleghany Corporation and that as of December 6, 1949, Section 6 of Article II of the By-Laws of Alleghany Corporation read as follows:

"SEC. 6. One-third of the Board of Directors but not less than two Directors shall constitute a quorum for the transaction of business, but if, at any meeting of the Board, there be less than a quorum present, the members at the meeting may, without further notice, adjourn the same from time to time, not exceeding thirty days at any one time, until a quorum shall attend. Except as herein or in the Certificate of Incorporation provided or as required by law, a majority of such quorum but not less than two Directors shall decide any questions that may come before the meeting."

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the corporate seal of Alleghany Corporation this 2nd day of April, 1963.

/s/ BERNARD C. MCGUIRE
Assistant Secretary

(Seal)

IN THE UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT No. 195

(See opposite) ☞

[fol. 1527]

ALLEGHANY CORPORATION

nnual Report

FOR THE YEAR ENDED DECEMBER 31, 1949

[fol. 1528]

DIRECTORS AND OFFICERS

DIRECTORS

J. J. Anzalone	Herman R. Neff
Frank B. Bateman	Brooks Potter
O. Henry Briggs	R. W. Purcell
Walter W. Foskett	Andrew Van Pelt
Allan P. Kirby	Robert R. Young

EXECUTIVE COMMITTEE

Robert R. Young, *Chairman*

Allan P. Kirby	R. W. Purcell
J. J. Anzalone	Herman R. Neff

OFFICERS

Robert R. Young	*Chairman of the Board of Directors*
Allan P. Kirby	*President*
R. W. Purcell	*Vice Chairman and Vice President*
J. J. Anzalone	*Vice President and Secretary*
C. L. Peckham	*Treasurer, Assistant Secretary and Comptroller*

New York Transfer Agent:	*Cleveland Transfer Agent:*
J. P. Morgan & Co., Inc.	Central National Bank of Cleveland

This annual report is not a part of the soliciting material for the Corporation's annual meeting to be held May 3, 1950, at which the election of directors for the ensuing year is an item of business.

Proxies for the annual meeting will be requested on or about April 5, 1950, at which time the proxy statement required by the rules and regulations of the Securities and Exchange Commission will be sent to stockholders.

[fol. 1529]

ALLEGHANY CORPORATION

100 West Tenth Street, Wilmington 99, Delaware

March 15, 1950

To the Stockholders of Alleghany Corporation:

THE year 1949 was marked by additional increases in the asset value applicable to each share of Alleghany's Prior Preferred and Series A Preferred stocks, further progress toward elimination of the deficit in Surplus Account (which bars the way to dividend payments) and continued reduction of the accruals senior to the Common stock. Net income decreased, but this was due largely to non-recurring factors affecting the year-to-year comparison. Following is a condensation of the key facts and figures of the Corporation's 1949 record:

Net income, excluding security transactions, was $1,869,557, versus $3,925,952 in 1948.

Security transactions involved a net loss of $5,583,015, including net book loss on portfolio securities exchanged for Alleghany's own preferreds.

Year-end market value of investments exclusive of Missouri Pacific common was $937,381 *in excess of book value* (Investors Diversified Services being appraised at cost), whereas on December 31, 1948, it was $2,176,195 *below book value*.

Year-end holdings of cash plus market value of U. S. Government securities were about $3,300,000 in excess of all debt liabilities.

Prior Preferred stock in public hands was reduced by 19,631 shares, or 34.5%.

Series A Preferred stock in public hands was reduced by 131,829 shares, or 30.3%.

Reduction in the publicly outstanding preferreds cut the combined dividend arrears by $14,282,684.

December 31 net asset value per Prior Preferred share was $885.64, versus $746.74 a year before.

December 31 net asset value per Series A Preferred share was $97.67, versus $86.25 a year before.

The deficit in Surplus Account decreased by $3,896,484, or more than 62%.

Diversification of investment interests increased notably.

[1]

[fol. 1530]

EARNINGS FOR THE YEAR

As indicated above, Alleghany's 1949 net income exclusive of security transactions was $2,056,395 less than that of the preceding year. However, the earlier (1948) account took in $1,456,897 non-recurring accumulated interest on Chicago, Rock Island & Pacific Railroad Company and Central of Georgia Railway Company bonds received in the reorganization of those railroads. Gross income, expenses and other income account items are shown on Page 12, together with a Statement of Profit and Loss on Security Transactions.

Itemization of Alleghany's 1949 security transactions is provided on Pages 8 and 9. For your added information, subsequent security transactions up to March 1, 1950, are itemized on Page 9.

REACQUISITIONS OF ALLEGHANY PREFERRED STOCKS

The program of advantageous reacquisitions of the Corporation's own Prior Preferred and Series A Preferred stocks went forward briskly in 1949 through the use of varied procedures, as per the following tabulation:

	SHARES REACQUIRED	
BASIS OF REACQUISITION	*Prior Preferred*	*Series A Preferred*
Exchange Offer of May 5*	4,784	41,988
Exchange Offer of September 17*	9,647	13,731
Invitation for Tenders of December 17**	1,000	4,550
Open Market Purchases	4,200	71,560
TOTALS	19,631	131,829

*Reacquired shares canceled. **Reacquired shares to be canceled.

Between the turn of the year and March 1, 1950, the Corporation reacquired an additional 1,420 shares of Prior Preferred stock and 53,126 shares of Series A Preferred stock.

Following is a summary of results from September 9, 1946, when the reacquisition program was initiated, to March 1, 1950:

	SHARES REACQUIRED	PER CENT OF 9/9/46 TOTAL	PAID FOR REACQUIRED SHARES*	AVERAGE PAID PER SHARE*
Prior Preferred	71,281	66.61%	$ 4,974,303	$69.78
Series A Preferred	417,155	62.49%	21,271,457	50.99

*On basis of cash repurchase prices and market values of portfolio securities exchanged.

As a result of these reacquisitions, all classes of the Corporation's remaining stockholders have obtained substantial benefits in the form of improved position. Had the reacquisitions not occurred, the asset coverage for the Prior Preferred as of March 1, 1950, would have been only $515.18 per share, instead of the actual $804.55 per share, and the asset coverage for the Series A Preferred would have been only $68.41, instead of the actual

[fol. 1531]

$102.22. Moreover, $45,644,725 of accumulated dividends have been eliminated through the reacquisitions.

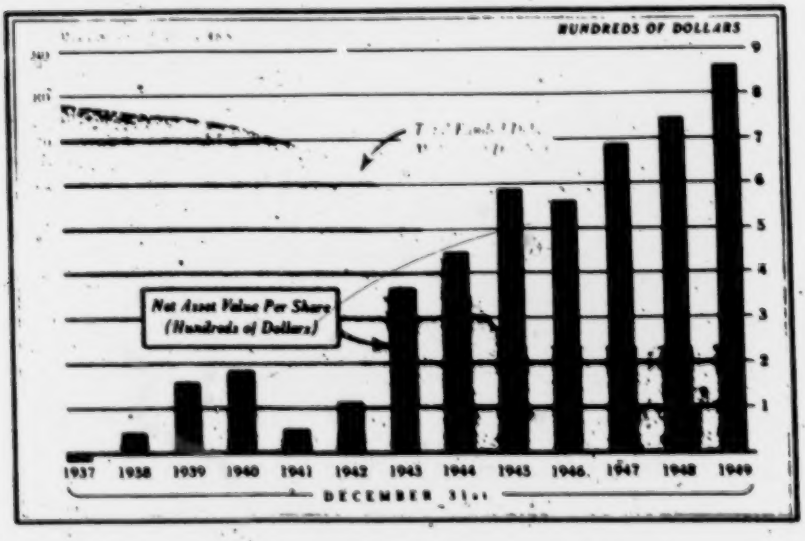
The reacquisitions have also been a significant factor in reducing the deficit in Surplus Account. Without them, the deficit would have been $17,251,430 as of March 1, 1950, whereas actually it was $1,200,410.

REARRANGEMENT OF DEBT TERMS

In 1937, when the present management assumed office, the Corporation's outstanding indebtedness totaled $78,821,200. It now amounts to $24,000,000. The present debt is represented by a $15,000,000 bank loan maturing July 3, 1953, and a $9,000,000 bank loan which would have matured June 1, 1949, but has been extended for a further period of seven years, subject, however, to termination on sixty days' notice by either party. Although the debt could have been paid off readily, it was considered best to keep the funds available for possible exceptional investment opportunities in the future. Interest provisions of both the $9,000,000 and $15,000,000 bank loans were rewritten in 1949, the practical effect being to assure the Corporation of a net return on "idle money." Under present provisions all of the borrowed funds could be kept in long-term U. S. Government securities and still yield more than the interest Alleghany would have to pay to the banks.

NET ASSET VALUE OF PRIOR PREFERRED STOCK

Against Background of TOTAL FUNDED DEBT

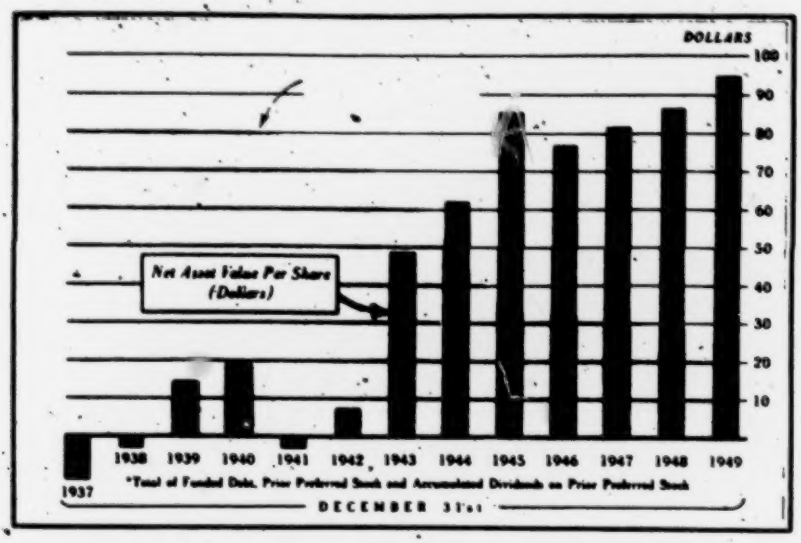


[3]

[fol. 1532]

NET ASSET VALUE OF SERIES A PREFERRED STOCK

Against Background of All SENIOR OBLIGATIONS



THE CORPORATION'S INVESTMENTS

To safeguard the ultimate progress of the Corporation in a changing economic climate, it has been deemed advisable in recent years to increase the diversification of the investment portfolio, without altering Alleghany's essential character. There was definite progress along this line in 1949. Particularly interesting was the acquisition of a controlling position in Investors Diversified Services, Inc., discussed in more detail below. While noteworthy in its possibilities, the commitment in Investors Diversified Services is relatively modest from the standpoint of Alleghany's over-all placement of funds, accounting for only 4.64% of the value of the investment portfolio as of March 1, 1950. In the chart on Page 5 this investment is included in Other Corporate Securities — Miscellaneous.

Individual discussion of certain situations represented in the Alleghany portfolio follows:

The Chesapeake and Ohio Railway Company — In any discussion of individual portfolio items, Chesapeake and Ohio Railway traditionally claims first attention. At its peak in 1942, Alleghany's holding of C&O common amounted to 1,929,779 shares. The current holding amounts to 200,754 shares, or 2.6% of the outstanding total.

[fol. 1533]

C&O remains the largest railroad originator of bituminous coal traffic and has made proportionate gains in merchandise traffic. On the other hand, it has experienced difficulties common to all railroads (notably uncompensated increases in costs) and also has been handicapped by interruption of coal mining due to labor trouble. Reflecting the latter factor, 117 mine days were lost in the service area in 1949, the greatest loss of mine days in 25 years. Chiefly on that account, C&O was able to earn only $1.36 a common share in 1949, versus $3.72 in 1948. The railroad expects substantial improvement in its earnings as a result of the mining industry's new labor contracts signed March 5, 1950.

Common dividend declarations by C&O last year totaled $2.25 per share, as compared with $3 in 1948.

The Pittston Company — Alleghany owns voting trust certificates for 296,886 shares of Pittston's common stock (about 49% of the total); also 14,400 shares of the stock of Clinchfield Coal Corporation, which in turn is controlled by Pittston.

Pittston and its subsidiaries are leading factors in the coal industry and have enjoyed impressive expansion of volume and earning power. Under the unusual handicaps forced upon the coal industry by labor troubles, earnings in 1949 were seriously affected. The consolidated net earnings for the year amounted to only $2.25 per share of Pittston stock, compared with $8.56 in 1948. Pittston declared dividends of $1.25 a share in 1949, as against $2.00 in 1948.

Through its Clinchfield subsidiary, Pittston engages in the mining of coal of excep-

SUMMARY OF INVESTMENTS

AS OF MARCH 1, 1950

INVESTMENTS		PER CENT OF TOTAL HOLDINGS				
		10	20	30	40	50%
Chesapeake & Ohio Railway Company	$ 5,572,054	11.19%				
Pittston Company (and Clinchfield)	$ 7,906,998	15.23%				
Other Corporate Securities—Railroad	$ 4,661,788	11.55%				
Other Corporate Securities—Miscellaneous	$ 6,817,781	15.85%				
Cash and U.S. Government Securities			$ 24,543,860			46.18%

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tionally high quality. In addition, Clinchfield has large acreage of possible natural gas exploitation. Test work began in 1948 and by the end of 1949 four wells had been brought in and drilling was in progress on five more. The gas discoveries to date have been of limited volume but the outlook is regarded as highly encouraging. Expanded drilling activity is planned for 1950.

Investors Diversified Services, Inc. — Control of Investors Diversified Services, Inc., (IDS) was purchased in April of 1949, and Alleghany now owns approximately 91% of its voting stock.

IDS and its subsidiaries have outstanding with and are presently offering to the public various types of Face Amount Certificates paid for (and being paid for) by the holders thereof on an installment basis and providing for a guaranteed amount payable to the holder at maturity of the certificate. The monies are invested in mortgages and securities. All Certificates now being distributed are those of subsidiaries, the most important of which is Investors Syndicate of America. IDS distributes the latter's certificates and also manages its investments, as well as the investments of another subsidiary, Investors Syndicate of Canada. In addition, IDS distributes the shares and manages the portfolios of Investors Mutual, Inc., and two other affiliated open-end investment companies; as of December 31, 1949, these three affiliates had over 90,000 shareholders and combined assets of $192,182,808.

The 1949 net income of IDS (including proportionate share of earnings of its subsidiaries) amounted to approximately $1,631,000, compared with $374,355 for 1948.

Alleghany Corporation regards its interest in IDS as a long-term investment. Because of cash requirements of maturing IDS certificates, we do not expect any return on our investment in IDS for a number of years. The outlook for eventual profits is considered to be unusually promising.

Missouri Pacific Railroad Company — A new ICC reorganization plan for the Missouri Pacific System is now before the United States District Court. Like its predecessor, abandoned some time ago, the plan gives no recognition to the common stock of the Missouri Pacific Railroad Company and would hence render worthless the 499,200 shares of that stock which Alleghany has owned as a result of their acquisition under a previous management. Alleghany has filed objections to the plan. District Court hearing is set for March 27, 1950.

Your management expresses its appreciation of the continued support and cooperation of the Corporation's stockholders, which have been a significant factor in the attainment of the improved condition set forth in this report.

Respectfully submitted,

ROBERT R. YOUNG
Chairman

ALLAN P. KIRBY
President

[fol. 1535]

ALLEGHANY CORPORATION

Securities of corporations other than Missouri Pacific Railroad Company	*Shares or principal amount*	*Cost (A)*	*Indicated market quotations (A)*
RAILROAD:			
Chesapeake and Ohio Railway Company:			
Common stock (pledged 200,586 shares)	200,754 shs.	$ 7,872,459.54	$ 5,721,489.00
Chicago, Rock Island and Pacific Railroad Company:			
Common stock (voting trust certificates) (pledged)	26 shs. (B)	757.10	1,072.50
Kansas City Southern Railway Company:			
Preferred stock (voting trust certificates) (pledged 25,510 shares)	25,810 shs. (B)	1,370,776.66	1,580,862.50
New York, Chicago and St. Louis Railroad Company:			
Preferred stock (voting trust certificates) (pledged)	8,928 shs. (B)	1,164,121.92	1,265,544.00
Wheeling and Lake Erie Railway Company:			
Common stock (voting trust certificates) (pledged 33,900 shares)	33,910 shs. (B)	3,810,566.80	3,730,100.00
		$14,218,682.02	$12,299,068.00
NON-RAILROAD:			
Cleveland Cliffs Iron Company:			
Common stock (pledged)	32,294 shs.	$ 418,844.20	$ 480,373.25
Clinchfield Coal Corporation:			
Common stock (pledged 14,000 shares)	14,400 shs.	174,993.34	392,400.00
Hilton Hotels Corporation:			
Common stock (pledged)	40,000 shs.	415,000.00	480,000.00
Interlake Steamship Company:			
Common stock (pledged 11,377 shares)	12,252 shs.	414,180.14	398,190.00
Investors Diversified Services, Inc.:			
Class A common stock	48,225.61 shs.	392,811.45	392,811.45 (C)
Voting common stock	104,405.50 shs.	1,905,701.41	1,905,701.41 (C)
Long Island Lighting Company:			
6% preferred stock c/d (pledged)	755 shs.	74,221.80	81,351.25
7% preferred stock c/d (pledged)	600 shs.	65,424.96	73,800.00
Niagara Hudson Power Corporation:			
Common stock (pledged)	62,800 shs.	934,515.64	1,004,800.00
North American Company:			
Common stock (pledged)	71,612 shs.	1,400,840.30	1,369,579.50
The Pittston Company:			
Common stock (voting trust certificates) (pledged)	296,886 shs. (B)	5,481,276.61	6,679,935.00
Portsmouth Steel Corporation:			
Common stock (pledged)	37,000 shs	409,250.00	434,750.00
Southern Union Gas Company:			
Preference common stock (pledged)	108,187 shs.	1,947,366.00	2,623,534.75
Steep Rock Iron Mines, Ltd.:			
Common stock	100,000 shs.	131,164.16	218,000.00
		$14,165,590.01	$16,585,286.61
Total securities of corporations other than Missouri Pacific Railroad Company		$28,384,272.03	$28,834,294.61
U. S. Government obligations			
Treasury 2½% bonds, December 15, 1972/67 (pledged)	$21,424,000	21,753,431.27	22,240,790.00
Missouri Pacific Railroad Company			
Common stock	499,200 shs. (D)	40,233,514.41	249,600.00
Total Investments		$90,371,217.71	$51,324,684.61

(A) See Note 2 of Notes to Financial Statements. (B) See Note 3 of Notes to Financial Statements.
(C) At cost. (D) See Note 4 of Notes to Financial Statements.

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[fol. 1536]

ALLEGHANY CORPORATION

Securities Sold		
Bonds	***Face amount***	***Net Proceeds***
Central of Georgia Railway Company		
First mortgage 4%, Series A, due 1995	$ 1,343,206	$ 829,967.51
General mortgage 4½% income, Series A, due 2020	130,696	85,213.79
General mortgage 4½% income, Series B, due 2020	2,568,244	1,056,493.96
Certificates of interest re $1,244,000 first mortgage 5%, due 1945		101,075.00
Florida East Coast Railway Company		
First and refunding mortgage 5%, Series A, due 1974	1,510,000	791,612.82
Stocks	***Shares***	
American Power and Light Company		
$6 preferred	9,200	1,050,180.00
$5 preferred	6,200	596,130.00
Common	17,000	223,890.00
Atlantic Coast Line Railroad Company common	21,500	800,823.67
Blue Ridge Corporation common	32,100	117,148.95
Central of Georgia Railway Company		
Preferred, Series A	1,542.85	24,099.22
Preferred, Series B	31,078.12	496,890.74
Chesapeake and Ohio Railway Company common	324,446	9,109,048.94
Chicago, Rock Island and Pacific Railroad Company		
Preferred	50,000	2,874,555.00
Common	272,800	8,565,727.58
Kansas City Southern Railway Company preferred	20,000	1,161,630.00
New York, Chicago and St. Louis Railroad Company common	12,905.85	904,286.63
Seaboard Air Line Railroad Company		
Preferred	16,973.98	809,850.35
Common	124,109.92	1,953,593.94
West Kentucky Coal Company common	48,122	903,390.33
		$32,455,608.43

Securities Purchased		
Stocks	***Shares***	***Cost***
American Power and Light Company		
$6 preferred	9,200	$ 996,848.02
$5 preferred	6,200	563,923.78
Common	17,000	215,212.49
Blue Ridge Corporation common	32,100	116,362.50
Chesapeake and Ohio Railway Company common	1,600	63,614.29
Chicago, Rock Island and Pacific Railroad Company common	67,300	1,958,089.92
Clinchfield Coal Corporation common	400	10,822.35
Hilton Hotels Corporation common	40,000	415,000.00
Interlake Steamship Company common	11,252	381,101.56

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ALLEGHAN CORPORATION

Securities Purchased

Stocks	Shares	Cost
Investors Diversified Services, Inc.		
Class A common	48,225.61	$ 392,811.45
Common	104,405.50	1,905,701.41
Kansas City Southern Railway Company preferred	45,838	2,432,260.66
Long Island Lighting Company		
7% preferred	600	65,424.96
6% preferred	2,275	221,547.21
New York, Chicago and St. Louis Railroad Company preferred	9,000	1,173,510.00
Niagara Hudson Power Corporation common	62,800	934,515.64
North American Company common	86,400	1,688,097.93
Pittston Company common	12,200	271,465.47
Portsmouth Steel Corporation common	12,000	153,000.00
Seaboard Air Line Railroad Company preferred	1,500	76,466.01
Southern Union Gas Company cumulative preference common	108,187	1,947,366.00
Steep Rock Iron Mines, Ltd. common	100,000	131,164.16
West Kentucky Coal Company common	48,122	851,272.54
Wheeling and Lake Erie Railway Company common	33,910	3,810,566.80
		$20,776,145.15

Securities Sold

Stocks	Shares	Net Proceeds
American Power and Light Company common (new)	50,821	$1,038,123.78
Chicago, Rock Island and Pacific Railroad Company common	26	1,141.37
Long Island Lighting Company 7% preferred c/d	600	82,706.40
Niagara Hudson Power Company common	62,800	1,054,380.60
Southern Union Gas Company preference common	108,187	2,415,351.60
		$4,591,703.75

Securities Purchased

Stocks	Shares	Cost
American Power and Light Company common (new)	112,700	$1,939,905.17
Cleveland-Cliffs Iron Company common	1,890	29,727.43
Investors Diversified Services, Inc. voting common	100	2,000.00
Kansas City Southern Railway Company preferred	100	6,182.15
Pacific Power and Light Company common	120,930	3,899,992.50
Portsmouth Steel Corporation common	8,800	105,600.00
		$5,983,407.25

[fol. 1538]

ALLEGHANY

Balance Sheet as of

ASSETS

Investments at indicated market quotations (Note 2):		
Securities of corporations other than Missouri Pacific Railroad Company (Note 3) (cost $28,384,272.03):		
Pledged	$26,254,181.25	
Unpledged	2,580,113.36	$28,834,294.61
U. S. Government obligations (face amount plus unamortized premium, $21,753,431.27), pledged		22,240,790.00
Missouri Pacific Railroad Company common stock (Note 4) (cost $40,233,514.41), unpledged		249,600.00
		51,324,684.61
Cash on deposit and on hand (including $218,898.44 deposit for purchase of securities)		1,122,727.56
Cash collateral under bank loan agreements		3,926,223.99
Notes receivable (Note 2)		708,259.95
Dividends receivable, interest income accrued and sundry accounts receivable ($112,572.54 subject to collection by pledgees and application as provided in loan agreements):		
Dividends	79,331.50	
Interest	28,275.00	
Accounts receivable	66,161.73	173,768.23
Deferred charges:		
Unamortized debt expense	6,349.02	
Others	3,340.32	9,689.34
		$57,265,353.68

The accompanying notes to financial statements are an integral part hereof.

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[fol. 1539]

CORPORATION

December 31, 1952

LIABILITIES

Notes payable to banks:			
Due July 3, 1953		$15,000,000.00	
Due June 1, 1956		9,000,000.00	$24,000,000.00
Accounts payable and accrued liabilities:			
Interest on notes payable to banks		139,918.52	
Provision for Federal taxes on income		131,902.81	
Other		63,655.63	335,476.96
			24,335,476.96
Capital stock and surplus (deficit):			
Capital stock:			
Prior preferred convertible stock, no par value (Note 5):			
Authorized 150,000 shares; outstanding 92,601 shares at stated value of $10.00 per share	$ 926,010.00		
Less 55,430 shares reacquired and held in treasury (including 1,000 shares to be retired)	554,300.00	371,710.00	
Preferred stock, authorized 1,500,000 shares with a par value of $100.00 per share (Note 6):			
Outstanding 611,820 shares of cumulative 5½% preferred stock, Series A	61,182,000.00		
Less 308,310 shares reacquired and held in treasury (including 4,550 shares to be retired)	30,831,000.00	30,351,000.00	
Common stock, authorized 12,350,000 shares with a par value of $1.00 per share (Note 5):			
Outstanding 4,567,797 shares		4,567,797.00	
		35,290,507.00	
Surplus (deficit):			
Paid-in surplus (Note 7)	108,144,880.58		
Earned surplus (deficit), based on indicated market quotations for investments (Notes 2, 5, 6 and 7)	(110,505,510.86)	(2,360,630.28)	32,929,876.72
			857,266,353.68

The accompanying notes to financial statements are an integral part hereof.

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[fol. 1540]

ALLEGHANY CORPORATION

(Exclusive of Profit and Loss on Security Transactions)

FOR THE YEAR ENDED DECEMBER 31, 1949

INCOME:		
Dividends		$2,474,532.05
Interest earned on investments		400,252.57
Other interest and miscellaneous income		12,571.24
Total income		2,887,355.86
EXPENSES:		
Interest on notes payable to banks	$459,285.29	
Amortization of debt expense	12,045.88	
Administrative and general expenses	396,698.35	
Advances and expenses re Missouri Pacific Railroad Company reorganization (Note 4)	36,768.76	904,798.28
Income (exclusive of profit and loss on security transactions) before provision for Federal taxes on income		1,982,557.58
Provision for Federal taxes on income		113,000.00
Net income (exclusive of profit and loss on security transactions) transferred to earned surplus (deficit)		$1,869,557.58

FOR THE YEAR ENDED DECEMBER 31, 1949

Net loss on sales of securities	$5,362,672.92
Net loss on exchanges of investment securities for Alleghany Corporation preferred stocks	220,342.75
Net loss on security transactions transferred to earned surplus (deficit)	$5,583,015.67

The accompanying notes to financial statements are an integral part hereof.

[fol. 1541]

ALLEGHANY CORPORATION

Statement of Surplus (Deficit)

FOR THE YEAR ENDED DECEMBER 31, 1949

Paid-in surplus (Note 7):		
Balance December 31, 1948		$ 103,063,973.96
Excess of par value over cost of 131,829 shares of cumulative 5½% preferred stock, Series A, reacquired during the year, including 55,719 shares retired		5,865,946.62
Excess of consideration received over stated value of 5 shares prior preferred stock issued during year in exchange for interest coupons from called bonds due 1950		200.00
		108,930,120.58
Deduct $40.00 per share on 19,631 shares prior preferred convertible stock reacquired during the year (amount credited to paid-in surplus on issuance)		785,240.00
Balance December 31, 1949		$ 108,144,880.58
Earned surplus (deficit) (Notes 2, 5, 6 and 7):		
Balance December 31, 1948, per books (deficit)		$ (67,160,979.51)
Net loss for year on security transactions	$5,583,015.67	
Loss net income for year (exclusive of net loss on security transactions)	1,869,557.58	(3,713,458.09)
		(70,874,437.60)
Portion of cost in excess of $50.00 per share (amount paid in on issuance) on 19,631 shares prior preferred convertible stock reacquired during the year, including 14,431 shares retired		(584,540.16)
Balance December 31, 1949, per books (deficit)		(71,458,977.76)
Excess of recorded costs over indicated market quotations for investments (Note 2)		(39,046,533.10)
Balance December 31, 1949, based on indicated market quotations for investments		(110,505,510.86)
Total surplus (deficit) December 31, 1949, based on indicated market quotations		$ (2,360,630.28)

The accompanying notes to financial statements are an integral part hereof.

ALLEGHANY

...tes to Financial State...

1. The financial statements of Alleghany Corporation reflect the elimination of certain inter-company accounts with its inoperative subsidiary which has no other assets or liabilities.

2. The company's investments are stated at indicated market quotations at December 31, 1949, except capital stock of Investors Diversified Services, Inc., (holdings representing 90.86% of the voting stock and 27.43% of Class A common) The investment in and advance to Investors Diversified Services, Inc., are stated at cost to Alleghany Corporation during 1949 (capital stock $2,298,512.86 and unsecured note $137,259.95). The financial statements of Investors Diversified Services, Inc., indicate that its capital stock would have no equity in its net assets if said financial statements were adjusted for accrued but unrecorded certificate reserves and for adjustment of security valuations.

Though its investments are set forth in the financial statements at indicated market quotations as of December 31, 1949, except as noted above, Alleghany Corporation makes no representation as to the value of any such investments. The excess of recorded costs over indicated market quotations for investments at March 1, 1950, (investment in Investors Diversified Services, Inc., and in Pacific Power and Light Company acquired subsequent to December 31, 1949, at $3,899,992.50, carried at cost) aggregated approximately $39,100,000.00.

The book value (recorded cost) of the company's investments is stated substantially at cost, determined primarily on a first-in, first-out basis. The company is amortizing premiums paid on its investments in fully taxable bonds. The amount of bond premiums amortized for the year ended December 31, 1949, was $32,913.15.

3. Alleghany Corporation's control of The Chesapeake and Ohio Railway Company and its subsidiaries and affiliates through stock ownership was authorized and approved by the Interstate Commerce Commission in an order dated June 5, 1945, subject to the condition that Alleghany Corporation shall be considered as a carrier subject to certain provisions of the Interstate Commerce Act and shall be required to deposit, with independent voting trustees, its investments in stocks of other carriers (except its holdings in stocks of Missouri Pacific Railroad Company, now in reorganization under Section 77 of the Bankruptcy Act, as amended) and of The Pittston Company.

4. Since March 31, 1933, the property of Missouri Pacific Railroad Company has been under the jurisdiction of the United States District Court at St. Louis, Missouri, in a proceeding for its reorganization pursuant to Section 77 of the Bankruptcy Act. The common stock of Missouri Pacific Railroad Company was suspended from dealings by the New York Stock Exchange in 1941. Alleghany Corporation's holdings of that common stock were purchased prior to 1933.

[fol. 1543]
CORPORATION

[illegible] December 31, 19[illegible]

5. The prior preferred convertible stock, dividends on which are cumulative at the rate of $2.50 per share per annum, is redeemable on call at and entitled in voluntary and involuntary liquidation to $50.00 per share, plus accumulated unpaid dividends. As of December 31, 1949, Alleghany Corporation held in its treasury 55,430 shares of this stock (including 1,000 shares to be retired), reacquired at an aggregate cost of $3,706,637.57. The 37,171 shares outstanding with the public as of December 31, 1949, have an aggregate liquidating value, including unpaid dividend accumulations of $1,417,144.38 ($38⅛ per share), of $3,275,694.38.

Each share of prior preferred convertible stock is convertible into 10 shares of common stock and Alleghany Corporation has reserved shares of the latter for such conversion.

6. The authorized preferred stock having a par value of $100.00 per share is issuable in series; 1,195,000 shares thereof have been designated cumulative 5½% preferred stock, Series A, redeemable on call at and entitled in voluntary dissolution to $105.00 per share and entitled in involuntary dissolution to $100.00 per share plus, in each instance, accumulated unpaid dividends. As of December 31, 1949, Alleghany held in its treasury 308,310 shares of its Series A preferred stock (including 4,550 shares to be retired), reacquired at an aggregate cost of $13,967,712.99. The 303,510 shares of Series A preferred stock outstanding with the public as of December 31, 1949, have an aggregate liquidating value in voluntary dissolution of $31,868,550.00 and in involuntary dissolution of $30,351,000.00, plus unpaid dividend accumulations of $31,160,360.00 ($102-2/3 per share).

7. The aggregate of the declared, par or stated values of all issues of capital stock outstanding (other than shares held in the corporation's treasury) or reserved for issuance in exchange for bond interest coupons and the combined paid-in and earned surplus (deficit) (before giving effect to difference, $39,046,533.10, between cost of investments and indicated market quotations thereafter) exceeded the aggregate of the involuntary liquidating value of the cumulative prior preferred convertible stock, the cumulative 5½% preferred stock, Series A, and the unpaid dividend accumulations on such stock to December 31, 1949, by $7,186,076.69.

In the opinion of counsel for Alleghany Corporation, there are no remedies available to security holders which could arise solely by reason of the declaration or payment of a dividend having the effect of reducing surplus to an amount less than the amount by which the aggregate preferences of such preferred stocks on involuntary liquidation exceeds their aggregate declared or par values. However, the certificate of incorporation of Alleghany Corporation imposes certain restrictions upon the declaration or payment of dividends.

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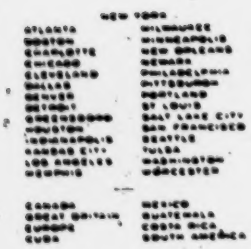
[15]

[illegible]

[fol. 1544]

PEAT, MARWICK, MITCHELL & CO.



HANNA BUILDING
CLEVELAND 15, OHIO

To the Board of Directors,
Alleghany Corporation:

We have examined the balance sheet of Alleghany Corporation as of December 31, 1949 and the related statements of income, profit and loss on security transactions and surplus (deficit) for the year then ended. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion, the accompanying balance sheet and statements of income, profit and loss on security transactions and surplus (deficit), with notes thereto, present fairly the financial position of Alleghany Corporation at December 31, 1949 and the results of its operations for the year then ended, in conformity with generally accepted accounting principles applied on a basis consistent, in all material respects, with that of the preceding year.

PEAT, MARWICK, MITCHELL & Co.

Cleveland, Ohio, March 1, 1950.

IN THE UNITED STATES DISTRICT COURT
PLAINTIFFS' EXHIBIT No. 198

ADDITIONAL MATERIAL

IN CONNECTION WITH PROXY STATEMENT

of

ALLEGHANY CORPORATION

for

Annual Meeting of Stockholders May 3, 1950

Under date of April 6, 1950, the management of Alleghany Corporation furnished to the stockholders of the Corporation a Proxy Statement in connection with the solicitation by the management of proxies to be voted at the Annual Meeting of stockholders of the Corporation.

The Corporation has entered into an Agreement, dated January 20, 1950, with Mr. Robert W. Purcell, who is a Director, Vice-Chairman of the Board and Vice-President of the Corporation, as described on pages 3 and 4 of the Proxy Statement, which provides that Mr. Purcell will use his best efforts to acquire shares of common and/or Class A common stock of Investors Diversified Services, Inc. at the lowest prices available and that in no event shall the price exceed an average of $10 per share or an aggregate total purchase price of $125,000. The Agreement further provides that the Corporation will at any time on or before January 20, 1955 purchase from Mr. Purcell, at his election, shares of common and/or Class A common stock of Investors Diversified Services, Inc. acquired by him and paid to him the cost to him of the shares, but not in excess of an average price of $10 per share and for an aggregate total purchase price of $125,000.

Beginning on page 5 of the Proxy Statement there are described transactions involving the acquisition by Messrs. Allan P. Kirby, Robert R. Young and J. J. Anzalone, officers and directors of the Corporation, of shares of Class A common stock of Investors Diversified Services, Inc. in exchange for shares of the Corporation's preferred stocks. These transactions are subject to ratification or rejection by the stockholders of the Corporation at the Annual Meeting to be held May 3, 1950. At page 7 of the Proxy Statement the statement is made that Messrs. Kirby, Young and Anzalone have assured the Corporation that shares of Class A common stock of Investors Diversified Services, Inc. to be acquired by them pursuant to such exchanges are being acquired solely for investment.

Messrs. Young and Kirby have expressed a willingness, in the event Mr. Purcell is unable to purchase in the open market a sufficient number of shares of common or Class A common stock of Investors Diversified Services, Inc., to sell to Mr. Purcell, in equal amounts, at $8.1453 per share (the cost to them of such shares) such portion of the shares of Class A common stock to be acquired by them pursuant to such exchanges as will enable Mr. Purcell to acquire shares of Investors Diversified Services, Inc. common and/or Class A common stock having a total aggregate cost of $125,000, including the cost of shares otherwise acquired. At the present time or at the prices above specified this would involve approximately 12,000 shares of the 48,125 shares of Class A common stock of Investors Diversified Services, Inc. which may be acquired by Messrs. Young and Kirby pursuant to the exchange offer. Mr. Purcell has indicated an intention to purchase such shares from Messrs. Young and Kirby in such event. Any shares so purchased by Mr. Purcell would be held by him, subject to the provisions of the Agreement with the Corporation dated January 20, 1950, pursuant to which, under certain circumstances, the Corporation may acquire such shares from Mr. Purcell, as described in the Proxy Statement of April 6, 1950.

Since the proposed acquisition of Investors Diversified Services, Inc. stock by Mr. Purcell from Messrs. Young and Kirby was not mentioned in the Proxy Statement which you have heretofore received, the foregoing facts are submitted to the stockholders for their consideration with the Proxy Statement dated April 6, 1950. Shareholders who, after consideration of the foregoing, may wish to revoke proxies already submitted should advise the Corporation to that effect by telegram or by mailing the enclosed postcard so as to be received by the Corporation prior to the meeting on May 3, 1950.

ALLEGHANY CORPORATION
By J. J. ANZALONE
Secretary.

April 26, 1950

[fol. 1546]

I hereby revoke the proxy previously submitted for use at the Annual Meeting to be held May 3, 1950.

_____ (Date)

_____ (Signature)

If you do not wish to revoke your proxy it is not necessary to mail this card.

2

PROXY STATEMENT

ALLEGHANY CORPORATION

Annual Meeting of Stockholders May 3, 1950

This statement is furnished in connection with the solicitation of proxies from holders of the outstanding three classes of stock of Alleghany Corporation to be voted at the annual meeting of stockholders of the Corporation (and at any and all adjournments thereof) for the purposes referred to below and set forth in the accompanying notice of the annual meeting of stockholders. Stockholders of record as of the close of business on April 13, 1950 will be entitled to vote. The transfer books will not be closed.

Copies of the annual report of the Corporation to its stockholders for 1949, including financial statements, were mailed to stockholders on March 24. Copies will also be mailed to persons becoming stockholders of record between March 24, 1950 and April 13, 1950, and will also be furnished to stockholders upon request.

Election of Directors

It is intended that proxies in the enclosed form received from holders of Common Stock, unless otherwise limited, will be voted for the following: J. J. Anselone, Frank B. Bateman, O. Henry Briggs, Allan P. Kirby, Walter W. Foskett and R. W. Purcell.

It is intended that proxies in the enclosed form received from holders of Cumulative 5½% Preferred Stock, Series A (hereinafter called the "Preferred Stock, Series A"), unless otherwise limited, will be voted for the following: Robert R. Young and Andrew Van Pelt.

It is intended that proxies in the enclosed form received from holders of Prior Preferred Convertible Stock (hereinafter called the "Prior Preferred Stock"), unless otherwise limited, will be voted for the following: Herman R. Neff and Brooks Potter.

All of the foregoing nominees are present members of the Board of Directors of Alleghany Corporation and were elected by the stockholders.

The term of office for directors is one year and until their successors are elected and qualify.

In case any of the nominees above named is not a candidate at the annual meeting (an eventuality which the management of the Corporation does not anticipate), proxies in the enclosed form will be voted in favor of the balance of those named, unless otherwise limited, and may be voted for substitute nominees designated by the management.

Voting Securities and Principal Holders Thereof

The outstanding number of each class of voting securities of Alleghany Corporation as of March 8, 1950 is as follows: 35,751 shares of Prior Preferred Stock; 250,384 shares of Preferred Stock, Series A; and 4,567,797 shares of Common Stock. The Prior Preferred stockholders are entitled to vote at the annual meeting for the election of two directors; the Preferred, Series A, stockholders are entitled to vote at the annual meeting for the election of two directors; and the Common stockholders are entitled to vote at the annual meeting for six directors and on all other matters to come before the meeting.

As of March 8, 1950 Mr. Allan P. Kirby, one of the nominees named below, was the beneficial owner of 516,500 shares, or 11.3%, of the Common Stock of the Corporation. Mr. Kirby was also the beneficial owner of 27,856 shares, or 11.1%, of the Preferred Stock, Series A, of the Corporation, 2,420 shares of which have been tendered to the Corporation in exchange for 24,062 shares of Investors Diversified Services, Inc. Class A Stock, subject to ratification or rejection by the Common stockholders as set forth below. If the Common stockholders ratify the exchanges, as described below, Mr. Kirby will be the beneficial owner of 25,436 shares, or 10.36%, of the outstanding Preferred Stock, Series A, of the Corporation. Mr. Kirby is President of a charitable corporation, in which he has no financial interest, which owned on March 8, 1950, 6,700 shares of Alleghany Corporation Common Stock. To the knowledge of the Corporation, no other person held of record or owned beneficially on March 8, 1950, as much as 10% of any class of the outstanding voting securities of the Corporation.

The following statements concerning the beneficial ownership of the security holdings of the nominees named are based upon information received from the nominees themselves as to their respective holdings as of March 8, 1950.

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[fol. 1547] In the United States District Court Plaintiffs' Exhibit No. 199

Nominee	Principal Occupation	First Became a Director	Number of Shares Owned: Prior Preferred Stock	Number of Shares Owned: Preferred Stock Series A	Number of Shares Owned: Common Stock
J. J. Anzalone	Vice President and Secretary of Alleghany Corporation Assistant Vice President, The Chesapeake and Ohio Railway Company	1940	10(1)	—	300
Frank B. Bateman	Vice President and Director of Blair-Rollins & Co. Inc. (Investment Bankers)	1939	—	—	500
O. Henry Briggs	Industrial Consultant	1938	—	—	200
Walter W. Foskett	Attorney; Trustee, Chairman and General Counsel of Estate of Sir Henry Oakes, Bt., deceased, Nassau, Bahamas; General Investments	1938	—	—	28,946
Allan P. Kirby	President of Alleghany Corporation Director of The Chesapeake and Ohio Railway Company Management of Personal Affairs	1937	—	27,858(2)	516,500
Herman R. Neff	Engineer, President of The Geo. S. Rider Co., Cleveland, Ohio (Professional Services—preparation of plans and specifications for industrial and institutional buildings)	1935	10	—	—
Brooks Potter	Attorney; a partner of Choate, Hall and Stewart, 30 State St., Boston, Mass. Practice of Law	1947	400	—	—
R. W. Purcell	Vice Chairman of the Board and Vice President of Alleghany Corporation Vice Chairman of the Board and Vice President—Law of The Chesapeake and Ohio Railway Company	1942	--	—	1,000
Andrew Van Pelt	Director of The Chesapeake and Ohio Railway Company Management of Personal Affairs and Real Estate	1948	—	100	—
Robert R. Young	Chairman of the Board of Alleghany Corporation Chairman of the Board of The Chesapeake and Ohio Railway Company	1937	—	10,083(3)	—

(1) These shares have been tendered to the Corporation in exchange for 100 shares of Investors Diversified Services, Inc. Class A Stock, subject to ratification or rejection by the Common stockholders as set forth below.

(2) 2,420 of these shares have been tendered to the Corporation in exchange for 24,062 shares of Investors Diversified Services, Inc. Class A Stock, subject to ratification or rejection by the Common stockholders as set forth below.

(3) 2,420 of these shares have been tendered to the Corporation in exchange for 24,062 shares of Investors Diversified Services, Inc. Class A Stock, subject to ratification or rejection by the Common stockholders as set forth below.

Remuneration and Other Transactions with Directors, Officers and Others

The following aggregate remuneration exceeding $25,000.00 directly or indirectly was paid or set aside by Alleghany Corporation and its subsidiaries to, or for the benefit of, the following persons for services in all capacities while acting as directors or officers, and the three highest paid officers of Alleghany Corporation in 1949.

Name of Individual or Identity of Group	Capacities in which Remuneration was Received	Fees and Salaries
All directors and officers as a group	Directors and Officers	$141,597.57(1)
Robert R. Young	Director and Chairman of the Board of Alleghany Corporation Director and Chairman of the Board of The Chesapeake and Ohio Railway Company	29,060.00(2)
R. W. Purcell	Director, Vice Chairman of the Board and Vice President of Alleghany Corporation Director, Vice Chairman of the Board and Vice President—Law, The Chesapeake and Ohio Railway Company Director, Investors Diversified Services, Inc.	62,383.16(3)
J. J. Ansalone	Director, Vice President and Secretary of Alleghany Corporation Assistant Vice President, The Chesapeake and Ohio Railway Company Director, Investors Diversified Services, Inc.	30,554.41(4)

(1) Of this amount, $55,280 was received from Alleghany Corporation.

(2) Of this amount, $21,560 was received from Alleghany Corporation.

(3) Of this amount, $11,860 ($10,000 of which was paid in January, 1950) was received from Alleghany Corporation.

(4) Of this amount, $6,860 was received from Alleghany Corporation.

Alleghany Corporation has no pension or retirement plan and no amounts are paid or set aside by Alleghany Corporation for the account of any of the above directors or officers for such purpose.

During the past year, the Investment Banking Company of Blair-Rollins & Co. Inc., of which Frank B. Bateman is Vice President, received commissions of $10,900.00 from Alleghany Corporation for acting as agent for Alleghany Corporation in purchasing certain securities.

Interest of Directors and Nominees in Transactions with the Corporation

On January 20, 1950, the Corporation, pursuant to authorization by its Board of Directors, entered into an agreement with Mr. Robert W. Purcell, who is a director, Vice Chairman of the Board and a Vice President of the Corporation, and who is also a director of Investors Diversified Services, Inc., which provides that Mr. Purcell will use his best efforts to acquire shares of common and/or Class A common stock of Investors Diversified Services, Inc. at the lowest prices available, which prices shall not exceed $10 per share, and the Corporation will, at any time on or before January 20, 1955, purchase from him at his election shares of common or Class A common stock of Investors Diversified Services, Inc. acquired by him and pay to him the cost to him of the shares, but not in excess of an average price of $10 per share, and for an aggregate total purchase price of not to exceed $125,000, unless a higher average or total price is consented to in writing by the Corporation. The agreement provides that Mr. Purcell will assume an active part in the administration of the affairs of Investors Diver-

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sified Services, Inc., its subsidiaries and affiliates, for which services he may be paid fees or salary, and that he will grant to the Corporation the right of first refusal of the shares covered by said agreement, at a price equal to his cost or 5% below the price at which such shares are to be offered or sold to others. Mr. Purcell further agrees that, for a period of 30 days after January 20, 1955, or any later date to which the contract may be extended, the Corporation will have the right to purchase from him the shares covered by the agreement at a price which shall be either (a) Mr. Purcell's cost, or (b) 5% below the price at which said stock shall be offered in the market at the time, or (c) the liquidating value of said shares as determined by the company's balance sheet on a consolidated basis, whichever shall be greater. On March 8, 1950 Mr. Purcell owned no shares of common and 8,838 shares of Class A common stock of Investors Diversified Services, Inc. These shares of Class A common stock were acquired by him at an average cost of $5.562 per share. The effect of the contract is to put Mr. Purcell in a position to realize a profit and to protect him against loss in the acquisition by him of shares of common and/or Class A common stock of Investors Diversified Services, Inc.

During the past fiscal year the Corporation, by an Invitation for Tenders dated December 17, 1949, directed to the holders of the Corporation's Prior Preferred Convertible stock and Cumulative 5½% Preferred stock, Series A, invited tenders of such stock in exchange for certain securities termed "Offered Securities" which were held in the portfolio of the Corporation. The period of the Invitation for Tenders expired on January 20, 1950 and was extended, pursuant to the right reserved in said Invitation for Tenders, to February 20, 1950. Action on tenders received was taken, as provided in the Invitation for Tenders, on December 28, 1949, and on January 20 and February 20, 1950.

On December 28, 1949, pursuant to the Invitation for Tenders, the Corporation accepted tenders of the aforementioned preferred stocks from officers and directors as follows:

1,000 shares of the Corporation's Prior Preferred stock at $81,000 tendered by Allan Corporation, a personal holding company all of the stock of which is owned by Mr. Allan P. Kirby, a director and President of Alleghany Corporation, in exchange for 4,291 shares of North American Company common stock, having a market value on December 28, 1949 of $80,992.63, and $7.37 in cash. Allan Corporation advises that the shares so tendered were not acquired by it within two years prior to the transaction. The shares so tendered had a market value on December 28, 1949 of $83,000.

On January 20, 1950, pursuant to the Invitation for Tenders, the Corporation accepted tenders of the aforementioned Preferred stocks from officers and directors of the Corporation as follows:

1,000 shares of the Corporation's Prior Preferred stock at $81,000 tendered by Allan Corporation, a personal holding company all of the stock of which is owned by Mr. Allan P. Kirby, a director and President of Alleghany Corporation, in exchange for 2,145 shares of North American Company common stock and 2,234 shares of American Power and Light Company new common stock, having a market value on January 20, 1950 of $80,978.12, and $21.88 in cash. Allan Corporation advises that the shares so tendered were not acquired by it within two years prior to the transaction. The shares so tendered had a market value on January 20, 1950 of $81,750.

300 shares of the Corporation's Prior Preferred stock at $24,600 tendered by Mr. Andrew Van Pelt, a director of Alleghany Corporation, in exchange for 177 shares of New York, Chicago and St. Louis Railroad Company preferred stock having a market value on January 20, 1950 of $24,470.25, and $129.75 in cash. Mr. Van Pelt advises that the shares so tendered were acquired by him within two years prior to the transaction at a cost of $20,975. The shares so tendered had a market value on January 20, 1950 of $24,525.

400 shares of the Corporation's Series A Preferred stock for $33,600 tendered by Mr. Andrew Van Pelt, in exchange for 243 shares of New York, Chicago and St. Louis Railroad Company preferred stock having a market value on January 20, 1950 of $33,594.75, and $5.25 in cash. Mr. Van Pelt advises that 100 of these shares so tendered were acquired by him within two years prior to the transaction at a cost of $4,600 and that the remaining 300 shares so tendered were not acquired by him within two years prior to the transaction. The shares so tendered had a market value on January 20, 1950 of $33,600.

400 shares of the Corporation's Series A Preferred stock for $33,600 tendered by Mrs. Sarah Van Pelt, wife of Mr. Andrew Van Pelt, in exchange for 243 shares of New York, Chicago and St. Louis Railroad Company preferred stock having a market value on January 20, 1950 of $33,594.75, and $5.25 in cash. Mr. Van Pelt advises that the shares so tendered by Mrs. Sarah Van Pelt were not acquired by her within two years prior to the transaction. The shares so tendered had a market value on January 20, 1950 of $33,600.

2,500 shares of the Corporation's Series A Preferred stock for $202,000 tendered by Allan Corporation, a personal holding company all of the capital stock of which is owned by Mr. Allan P. Kirby, in exchange for 5,359 shares North American Company common stock, 5,787 shares of American

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Power and Light Company new common stock when issued, having an aggregate market value on January 20, 1950 of $207,965.51, and $34.49 in cash. Allan Corporation advises that the shares so tendered were not acquired by it within two years prior to the transaction. The shares so tendered had a market value on January 20, 1950 of $202,500.

11,300 shares of the Corporation's Series A Preferred stock for $940,160 tendered by Mr. Allan P. Kirby in exchange for 24,904 shares North American Company common stock, 25,935 shares American Power and Light Company new common stock when issued, having an aggregate market value on January 20, 1950 of $940,134.88 and $25.12 in cash. Mr. Kirby advises that the shares so tendered were not acquired by him within two years prior to the transaction. The shares so tendered had a market value on January 20, 1950 of $915,300.

6,100 shares of the Corporation's Series A Preferred stock for $507,520 tendered by Mr. Robert R. Young, a director and Chairman of the Board, in exchange for 22,548 shares of North American Company common stock and 755 shares Long Island Lighting Company 6% preferred stock, having an aggregate market value on January 20, 1950 of $507,511, and $9.00 cash. Mr. Young advises that the shares so tendered were not acquired by him within two years prior to the transaction. The shares so tendered had a market value on January 20, 1950 of $494,100.

500 shares of Series A Preferred stock for $41,600 tendered by Mr. Robert W. Purcell, a director, Vice Chairman of the Board and a Vice President, in exchange for 2,295 shares American Power and Light Company new common stock, when issued, having a market value on January 20, 1950 of $41,596.88 and $3.12 cash. Mr. Purcell advises that the shares so tendered were not acquired by him within two years prior to the transaction. The shares so tendered had a market value on January 20, 1950 of $40,500.

On February 20, 1950, the Corporation accepted tenders of the Preferred stocks pursuant to the Invitation for Tenders aforementioned from officers and directors of the Corporation as follows:

400 shares of the Corporation's Series A Preferred stock for $33,600 tendered by Mr. Andrew Van Pelt, a director of Alleghany Corporation, in exchange for 1,581 shares American Power and Light Company new common stock having a market value on February 20, 1950 of $33,596.25, and $3.75 in cash. Mr. Van Pelt advises that the shares so tendered were not acquired by him within two years prior to the transaction. The shares so tendered had a market value on February 20, 1950 of $32,400.

416 shares of the Corporation's Series A Preferred stock for $34,944 tendered by Mrs. Sarah Van Pelt, wife of Mr. Andrew Van Pelt, in exchange for 1,643 shares of American Power and Light Company new common stock having a market value on February 20, 1950 of $34,913.75, and $30.25 in cash. Mr. Van Pelt advises that the shares so tendered by Mrs. Sarah Van Pelt were not acquired by her within two years prior to the transaction. The shares so tendered had a market value on February 20, 1950 of $33,696.

Also during the past year, pursuant to an Exchange Offer dated May 5, 1949 offering to the holders of the Corporation's Preferred stocks, shares of The Chesapeake and Ohio Railway Company common stock in exchange for an aggregate of 50% of the outstanding shares of the Corporation's Prior Preferred stock and an aggregate of 10% of the outstanding shares of the Corporation's Preferred stock, Series A, Mr. Walter W. Foskett, a director of Alleghany Corporation exchanged 29 shares of the Corporation's Prior Preferred stock for 65 shares of Chesapeake and Ohio common stock at the exchange rate of 2¼ shares of Chesapeake and Ohio common stock for each share of Prior Preferred stock of the Corporation, and $8 in cash. Mr. Foskett also exchanged 2,063 shares of the Corporation's Series A Preferred stock for 3,094 shares of Chesapeake and Ohio common stock at the exchange rate of 1½ shares of Chesapeake and Ohio common stock for each share of the Preferred stock, Series A of the Corporation, and $16 cash. Mr. Foskett advises that the shares so tendered were not acquired by him within two years prior to the transaction. The shares so tendered had a market value on May 5, 1949 of $98,635.25.

Acquisition by Certain Officers of Investors Diversified Services, Inc. Class A Common Stock

The Corporation owns 104,505½ shares, or 90.9%, of the outstanding common stock of Investors Diversified Services, Inc. purchased at an average cost to the Corporation of $18.25 per share. Of these shares 104,405½ were purchased during the period April 11, 1949 to May 6, 1949 and 100 were purchased on February 16, 1950. The Corporation also owns 48,225.61 shares, or 27.4%, of the outstanding Class A common stock of Investors Diversified Services, Inc. purchased at an average cost to the Corporation of $8.1453 per share during the period April 8, 1949 to May 6, 1949.

The authorized capital stock of Investors Diversified Services, Inc. consists of 140,000 shares of common stock and 260,000 shares of common stock, Class A. Each share of common stock is entitled to one vote at all meetings of the stockholders; common stock, Class A is non-voting. Shares of capital stock of the corporation may be increased, reduced, or changed, or classes of preferred stock created, without

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the consent of holders of any class of stock other than common stock. Both classes of stock have equal rights in the event of liquidation, dissolution, or winding up of the Corporation, whether voluntary or involuntary, and no dividend may be declared or paid upon common stock unless and until dividends at the same rate be paid upon common stock, Class A.

At the meeting there will be submitted to the common stockholders for ratification or rejection the matter of the acquisition by certain officers of shares of Investors Diversified Services, Inc. Class A common stock from the Corporation in exchange for Prior Preferred stock and Series A Preferred stock held by them pursuant to the following preambles and resolutions of the Board of Directors adopted at its meeting held December 6, 1949:

WHEREAS, among the securities which had been considered as available to be offered to stockholders in exchange for the Corporation's outstanding Preferred stocks are the Corporation's holdings of 48,225.61 shares of Investors Diversified Services, Inc. Class A Common stock; and

WHEREAS, counsel for the Corporation has advised in connection therewith that, inasmuch as the Corporation is in control of Investors Diversified Services, Inc., no offer to stockholders of shares of that company could be made without registration with the Securities and Exchange Commission and has advised that if the offering of Investors Diversified Services, Inc. Class A Common stock was made to a limited number of persons registration would not be required; and

WHEREAS, in view of the size of the holding and the costs and delays incident thereto, such registration is not deemed advisable; and

WHEREAS, consideration having been given to a further offer, not a part of the public offer this day authorized, which would give to the Corporation's officers the right to exchange their holdings of Alleghany Prior Preferred stock and 5½% Preferred stock, Series A, for Class A Common stock of Investors Diversified Services, Inc. on exchange ratios which would be not less favorable to the Corporation in relation to the respective market prices of Alleghany Preferred stocks received and the Investors Diversified Services, Inc. stock delivered than the exchange ratios which are accepted by the Company pursuant to the public offer; and

WHEREAS, it is considered desirable that the Corporation receive either its cost or the market price, whichever is higher, of Investors Diversified Services, Inc. Class A Common stock which may be given in exchange, the current market price of such stock being approximately $5.50 per share and the average cost to the Corporation of such stock being $3.1453 per share; and

WHEREAS, such a program would have a two-fold result in that it would provide the Corporation a further opportunity to acquire Prior Preferred and Series A Preferred stocks at advantageous prices in line with the Company's policy, and it would give the officers who accept the Class A stock of Investors Diversified Services, Inc. a further incentive to make successful the operations of that company in which the Corporation continues to hold a large controlling interest;

NOW, THEREFORE, BE IT

RESOLVED, that on any date on which tenders are accepted pursuant to the offer of exchange of portfolio securities for the Corporation's outstanding publicly held Prior Preferred and Series A Preferred stocks heretofore authorized, or on any date to which such exchange offer may be extended, the Corporation offer to its officers to exchange its portfolio holdings of 48,225.61 shares of Investors Diversified Services, Inc. Class A Common stock for shares of either the Corporation's Prior Preferred stock or Series A Preferred stock held by the officers, the Prior Preferred stock and Series A Preferred stock to be valued at market prices but not in excess of the prices of such stocks accepted by the Corporation pursuant to the public exchange offer this day authorized, and the Investors Diversified Services, Inc. Class A Common stock to be valued at its market price or cost to Alleghany, whichever shall be higher. The market prices of the Alleghany Prior Preferred and Series A Preferred stocks and the Investors Diversified Services, Inc. Class A Common are to be determined on the basis of the last sale on the final exchange date, but, if no sale occurs on that date, then the market price shall be the mean between the bid and asked prices at the close of the market on that day; and be it further

RESOLVED, that any exchange of Prior Preferred or Series A Preferred stocks of Alleghany Corporation for Investors Diversified Services, Inc. Class A Common stock made by any of the officers of the Corporation pursuant to the foregoing resolution shall be subject to ratification by the Common stockholders of this Corporation at the Annual Meeting of Stockholders on May 3, 1950; and be it further

RESOLVED, that the Chairman of the Board or the Vice Chairman or the President or any Vice President of the Corporation is authorized to accept or reject tenders of the Corporation's Preferred

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stocks made by any of the officers of this Corporation submitted in accordance with these resolutions; to make delivery of Investors Diversified Services, Inc. Class A Common stock required to satisfy any such tenders accepted; and to execute and deliver in the name and on behalf of the Corporation all other documents and to do any and all things which may be deemed necessary, proper, desirable or convenient to carry out the intent of the foregoing resolutions.

On January 20, 1950 the Corporation accepted tenders of Preferred stocks offered, pursuant to the foregoing resolutions, and subject to ratification or rejection by the common stockholders as therein provided, from officers of the Corporation as follows:

Mr. Allan P. Kirby, a director and President of the Corporation, tendered 2,420 shares of the Corporation's Preferred stock, Series A, for $196,020.00, or $81 per share, the market value of said shares on January 20, 1950, in exchange for 24,062 shares Investors Diversified Services, Inc. Class A common stock valued at $195,992.21, or $8.1453 per share, the average cost of said Class A common stock to the Corporation, and cash of $27.79. The market price of the Corporation's Preferred stock, Series A on March 31, 1950 was $70 per share; the market on March 31, 1950 of the Class A common stock of Investors Diversified Services, Inc. was $9 bid, $9.75 asked per share. Mr. Kirby advises the shares so tendered were not acquired by him within two years prior to the transaction.

Mr. Robert R. Young, a director and Chairman of the Board of Directors of the Corporation, tendered 2,420 shares of the Corporation's Preferred stock, Series A, for $196,020.00, or $81 per share, the market value of said shares on January 20, 1950, in exchange for 24,063 shares Investors Diversified Services, Inc. Class A common stock valued at $196,000.35, or $8.1453 per share, the average cost of said Class A common stock to the Corporation, and cash of $19.65. The market price of the Corporation's Preferred stock, Series A, on March 31, 1950 was $70 per share; the market on March 31, 1950 of the Class A common stock of Investors Diversified Services, Inc. was $9 bid, $9.75 asked per share. Mr. Young advises the shares so tendered were not acquired by him within two years prior to the transaction.

Mr. J. J. Anzalone, a director, a Vice President and Secretary of the Corporation, tendered 10 shares of the Corporation's Prior Preferred stock for $817.50, or $81.75 per share, the market value of said shares on January 20, 1950, in exchange for 100 shares of Investors Diversified Services, Inc. Class A common stock valued at $814.53, or $8.1453 per share, the average cost of said Class A common stock to the Corporation, and $2.97 in cash. The market on March 31, 1950 of the Corporation's Prior Preferred stock was $78 bid, $81 asked per share; the market on March 31, 1950 of the Class A common stock of Investors Diversified Services, Inc. was $9 bid, $9.75 asked per share. Mr. Anzalone advises that the shares so tendered were not acquired by him within two years prior to the transaction.

Messrs. Kirby, Young and Anzalone have assured the Corporation that the shares of Class A common stock of Investors Diversified Services, Inc., to be acquired by them pursuant to such exchanges, are being acquired solely for investment.

The Corporation is of the opinion that the foregoing transactions provide a further opportunity for the Corporation to acquire Preferred and Prior Preferred stocks at advantageous prices in line with the Corporation's policy. Mr. Anzalone is presently a director of Investors Diversified Services, Inc. Although neither Mr. Kirby nor Mr. Young is an officer or director of that company, both of them in their capacities as officers and directors of Alleghany Corporation, which controls Investors Diversified Services, Inc. and directs its policies, contribute greatly, because of their experience and skill in such matters, in the management of that company, devoting a substantial amount of their time to such activities. It is expected that they will have further incentive, through ownership of Investors Diversified Services, Inc. stock, to make successful the operations of that Corporation in which Alleghany holds a large controlling interest.

While a matter of such a nature is not required by the Corporation's Certificate of Incorporation or By-Laws to be submitted to the stockholders, the Board of Directors believed that, inasmuch as these transactions involve dealings with the principal officers of the Corporation, it was desirable and proper that the transactions be consummated only if the holders of a majority of the Corporation's common stock approved, and therefore directed that the matter be submitted to the common stockholders for ratification or rejection.

Messrs. Allan P. Kirby and J. J. Anzalone, who also own common stock of the Corporation, have advised the Corporation that the shares of common stock held by them will not be voted either for ratification or rejection of the transactions involving exchanges by officers of the Corporation of Preferred stocks for Class A common stock of Investors Diversified Services, Inc. The proxies, exclusive of proxies which may be tendered by Messrs. Allan P. Kirby and J. J. Anzalone, will be voted in favor of ratification, unless the stockholder specifies otherwise, in which case, the shares represented by any such proxy will be voted in accordance with the specifications made by such proxy. If the holders of a majority of the shares of common stock, other than Messrs. Kirby and Anzalone, voting on such matter, vote in favor of ratifica-

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tion of the transactions, they will be finally consummated; otherwise the transactions will not be consummated. The general effect of ratification of these transactions would be that the Corporation would acquire 10 shares of its Prior Preferred stock having a market value on January 20, 1950 (the date of tender) of $817.50, or $81.75 per share, and 4,840 shares of its Preferred stock, Series A, having a market value on the same date of $392,040, or $81 per share, and in exchange therefore would dispose of 48,225 shares of Class A common stock of Investors Diversified Services, Inc. having a cost basis to the Corporation of $392,807.09, or $8.1453 per share, and cash in the amount of $50.41. The market price on March 31, 1950 of the Corporation's Prior Preferred stock was $78 bid, $81 asked per share and for the Preferred stock, Series A, the market price on the same date was $70 per share; the market on March 31, 1950 of the Class A common stock of Investors Diversified Services, Inc. was $9 bid, $9.75 asked per share.

Selection of Independent Public Accountants

At the meeting there will be submitted to the holders of common stock for ratification or rejection, the selection of Peat, Marwick, Mitchell & Co., independent public accountants, who have been selected by the Board of Directors as the accountants to make the Corporation's 1950 annual audit. The proxies will be voted for ratification unless the stockholder specifies otherwise, in which case the shares represented by such proxy will be voted in accordance with the specifications made by such proxy. If such selection be rejected by the meeting, it is intended that the proxies will be voted to select another independent public accountant or accountants for the purpose of making such audit.

All Other Matters Which May Properly Come Before the Meeting

In accordance with the usual procedure the minutes of the last annual meeting of stockholders held on May 4, 1949 will be presented to the meeting for the purpose of being received and filed and, if necessary, corrected, but the action taken is not to constitute approval or disapproval of any of the matters referred to in said minutes.

As of the date of this statement, the management knows of no business that will be presented for consideration at the meeting other than that which has been referred to above. As to other business, if any, that may properly come before the meeting, the proxies in the enclosed form will be voted in respect thereof in

sideration at the meeting other than that which has been referred to above. As to other business, if any, that may properly come before the meeting, the proxies in the enclosed form will be voted in respect thereof in accordance with the judgment of the person or persons voting the proxies.

Additional Information

The enclosed proxies are being solicited by the management of the Corporation by authorization of its Board of Directors, the cost of the solicitation being paid by the Company. If a proxy in the accompanyir form is duly executed and returned, the shares represented thereby will be voted and, where a specificatic is made by the stockholder on the ballot provided therein, will be voted in accordance with such specification. Any proxy given pursuant to this solicitation may be revoked by the person executing it at any time prior to its use at the meeting.

It is possible that the officers and regular employees of the Corporation may also, but without compensation (other than their regular compensation) solicit proxies by further mailing, personal conversations, or by telephone or telegraph, and the Corporation may reimburse brokerage firms and others for their expenses in forwarding solicitation material for this meeting to the beneficial owners. In addition to the solicitation of proxies by use of the mails and by the Corporation's officers and regular employees, the Corporation will employ several special employees, the number of such regular and special employees being now estimated at approximately fifteen, to solicit proxies by personal interviews and telephone calls. Such special employees will be paid weekly or monthly salaries and will be reimbursed for their actual out-of-pocket expenses. The anticipated cost of such salaries and expenses will be approximately $7,500.00, and will be paid by the Corporation.

By order of the Board of Directors.

ALLEGHANY CORPORATION

By J. J. Anzalone
Secretary.

April 6, 1950

CERTIFICATE

I, the undersigned, David W. Wallace, Secretary of Alleghany Corporation, a Maryland corporation, do hereby certify as follows:

1. A meeting of the Board of Directors of Alleghany Corporation was held on December 6, 1949, (hereinafter called "the meeting").

2. Messrs. J. J. Anzalone, O. Henry Briggs, Allan P. Kirby, Herman R. Neff, Robert W. Purcell, Andrew Van Pelt, and Robert R. Young constituting a quorum of the Board of Directors were present at the meeting.

3. The following is a true excerpt from the minutes of the meeting:

The Chairman stated that among the securities which had been considered as available to be offered to stockholders in exchange for the Corporation's outstanding Preferred stocks was the company's holdings of 48,225.61 shares of Investors Diversified Services, Inc. Class A Common stock. He stated, however, that he had been advised by Messrs. White & Case, counsel for the Corporation in this connection, that inasmuch as the Corporation is in control of Investors Diversified Services, Inc. no offer to stockholders of these shares could be made without registration with the Securities & Exchange Commission which, in view of the size of the holding and the costs and delays incident to registration, would not be worthwhile. He reported further that he had been advised by Messrs. White & Case that, if the offering of Investors Diversified Services, Inc. Class A Common stock was to a limited number of persons, registration would not be required. He, therefore, suggested to the Board that consideration be given to a further offer, not a part of the public offer this day authorized, which would give to the officers of Alleghany Corporation the right to exchange their holdings of Alleghany Prior Preferred stock and 5-1/2% Preferred stock, Series A, for Class A Common stock of Investors Diversified Services, Inc. on exchange ratios which would be not less favorable to the Corporation in relation to the respective market prices of the Alleghany Preferred stocks received and the Investors Diversified Services, Inc. stock delivered than the exchange ratios which are accepted by the company pursuant to the public offer. He pointed out that such a program would have a two-fold result: first, it would provide a further opportunity to acquire Prior Preferred and Series A Preferred stocks at advantageous prices in line with the company's policy, and second, it would give the officers who accept the Class A stock of Investors a further incentive to make successful the operations of that company in which Alleghany will continue to hold its large controlling interest.

A discussion ensued during which it was pointed out that the average cost to Alleghany Corporation of the Investors Class A stock which it holds was

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$8.1453 per share, whereas the current market price is only approximately $5.50 per share. The view was expressed that the Corporation should receive its cost for the Investors stock in market value of its own Prior Preferred and Series A Preferred stocks. After further discussion and upon motion duly made, seconded and unanimously carried, the following preambles and resolutions were adopted:

WHEREAS, among the securities which had been considered as available to be offered to stockholders in exchange for the Corporation's outstanding Preferred stocks are the Corporation's holdings of 48,225.61 shares of Investors Diversified Services, Inc. Class A Common stock; and

WHEREAS, counsel for the Corporation has advised in connection therewith that, inasmuch as the Corporation is in control of Investors Diversified Services, Inc., no offer to stockholders of shares of that company could be made without registration with the Securities and Exchange Commission and has advised that if the offering of Investors Diversified Services, Inc. Class A Common stock was made to a limited number of persons registration would not be required; and

WHEREAS, in view of the size of the holding and the costs and delays incident thereto, such registration is not deemed advisable; and

WHEREAS, consideration having been given to a further offer, not a part of the public offer this day authorized, which would give to the Corporation's officers the right to exchange their holdings of Alleghany Prior Preferred stock and 5-1/2% Preferred stock, Series A, for Class A Common stock of Investors Diversified Services, Inc. on exchange ratios which would be not less favorable to the Corporation in relation to the respective market prices of Alleghany Preferred stocks received and the Investors Diversified Services, Inc. stock delivered than the exchange ratios which are accepted by the Company pursuant to the public offer; and

WHEREAS, it is considered desirable that the Corporation receive either its cost or the market price, whichever is higher, of Investors Diversified Services, Inc. Class A Common stock which may be given in exchange, the current market price of such stock being approximately $5.50 per share and the average cost to the Corporation of such stock being $8.1453 per share; and

WHEREAS, such a program would have a two-fold result in that it would provide the Corporation a further opportunity to acquire Prior Preferred and Series A Preferred stocks at advantageous prices in line with the Company's policy, and it would give the officers who accept the Class A stock of Investors Diversified Services, Inc. a further incentive to make successful the operations of that company in which the Corporation continues to hold a large controlling interest;

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NOW, THEREFORE, BE IT

RESOLVED, that on any date on which tenders are accepted pursuant to the offer of exchange of portfolio securities for the Corporation's outstanding publicly held Prior Preferred and Series A Preferred stocks heretofore authorized, or on any date to which such exchange offer may be extended, the Corporation offer to its officers to exchange its portfolio holdings of 48,225.61 shares of Investors Diversified Services, Inc. Class A Common stock for shares of either the Corporation's Prior Preferred stock or Series A Preferred stock held by the officers, the Prior Preferred stock and Series A Preferred stock to be valued at market prices but not in excess of the prices of such stocks accepted by the Corporation pursuant to the public exchange offer this day authorized, and the Investors Diversified Services, Inc. Class A Common stock to be valued at its market price or cost to Alleghany, whichever shall be higher. The market prices of the Alleghany Prior Preferred and Series A Preferred stocks and the Investors Diversified Services, Inc. Class A Common are to be determined on the basis of the last sale on the final exchange date, but, if no sale occurs on that date, then the market price shall be the mean between the bid and asked prices at the close of the market on that day; and be it further

RESOLVED, that any exchange of Prior Preferred or Series A Preferred stocks of Alleghany Corporation for Investors Diversified Services, Inc. Class A Common stock made by any of the officers of the Corporation pursuant to the foregoing resolution shall be subject to ratification by the Common stockholders of this Corporation at the Annual Meeting of Stockholders on May 3, 1950; and be it further

RESOLVED, that the Chairman of the Board or the Vice Chairman or the President or any Vice President of the Corporation is authorized to accept or reject tenders of the Corporation's Preferred stocks made by any of the officers of this Corporation submitted in accordance with these resolutions; to make delivery of Investors Diversified Services, Inc. Class A Common stock required to satisfy any such tenders accepted; and to execute and deliver in the name and on behalf of the Corporation all other documents and to do any and all things which may be deemed necessary, proper, desirable or convenient to carry out the intent of the foregoing resolutions.

In Witness Whereof, I have executed this certificate and affixed the seal of the Corporation this 15 day of September, 1955.

(SEAL)

David W. Wallace
Secretary

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State of New York)
) ss.:
County of New York)

On this 15 day of September, 1955, in the said County of New York, before me, a Notary Public duly commissioned and qualified, in and for the State and County aforesaid, personally came David W. Wallace, personally known to me, and known to me to be the person described in and who executed the foregoing certificate, and acknowledged to me that he executed the same; and being by me duly sworn, did depose and say that he is the Secretary of the Board of Directors of the Alleghany Corporation; that as such officer he keeps the corporate minute books and seal of the said Corporation; and that the foregoing certificate truly sets forth the matters referred to therein as they appear in the minute books of the Corporation.

Subscribed and sworn to before me this 15 day of September, 1955.

NOTARIAL SEAL)

Florence V. Kenny

FLORENCE V KENNY
Notary Public State of New York
No. 24-7235200
Qualified in Kings County
Certified in New York County
Commission Expires March 30, 1956

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